No. 48781-1 –II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY, a political subdivision of the State of Washington,

Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE DOES I-XX, inclusive,

Appellants,

and

IN THE MATTER OF NUSAINCE AND UNPERMITTED CONDITIONS LOCATED AT
One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton Washington.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal is about whether the trial court erred during remand proceedings by fashioning remedies that failed to properly reflect this Court's earlier Published Opinion[1] and applicable laws. The Published Opinion instructed the trial court to fashion remedies on remand for an expansion of sound, an expansion associated with commercial military training, and site development permitting violations at the grandfathered shooting range owned and operated by Appellant Kitsap Rifle & Revolver Club (the "Club" or "KRRC"). The Court gave this instruction after reversing the trial court's decision to remedy these issues by terminating the Club's vested nonconforming use rights. The Published Opinion instructed the trial court to replace that remedy with new remedies that reflected the Club's right to continue and intensify the operation of its nonconforming shooting range.

Unfortunately, the trial court on remand employed a process that was unduly prejudicial to the Club, conflicted with basic principles of civil procedure, did not follow this Court's instructions, and resulted in remedies that conflict with the Published Opinion and applicable laws. In addition, the remedies are not precisely tailored as required by

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[1] *Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014) (hereafter, "*KRRC*" or "Published Opinion").

Washington law, and they are unclear or dependent on references to other documents for their meaning.

To remedy the expansion of sound, the trial court issued a declaratory judgment and injunction that prohibit "Use of high caliber weaponry greater than .30 caliber," "Practical shooting, uses, including organized competitions and practice sessions," and "Use of explosive devices including exploding targets." To remedy the commercial military training expansion, the trial court issued a declaratory judgment and injunction that prohibit "Commercial, for-profit uses" and "Military training uses." To remedy the site development violations, the trial court issued an injunction "requiring [the Club] to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment" and to submit its "application for permitting" to the County "within 180 days[.]"

In this appeal, the Club requests that each of these remedies be reversed and vacated. The Club also asks for the case to be remanded again with further instructions regarding how the trial court must fashion the remedies in question to avoid repeating the errors it committed on remand. Specifically, the trial court should be instructed:

(a) to allow for discovery and a trial-type, factfinding hearing pursuant to the civil rules to resolve all of the still-undecided fact issues raised

by the new remand remedies sought by the County and this Court's instructions regarding the fashioning of remedies to reflect the Club's right to continue and intensify;

(b) to make findings of fact and conclusions of law that delineate in specific terms the activities (and frequencies of activities) that fall within the Club's right to continue and intensify;

(c) to narrowly tailor any new expansion remedies to allow and not prohibit lawful activities, including those activities that fall within the Club's right to continue and intensify; and

(d) to make all new injunction remedies clear, unambiguous, and not dependent on references to other documents for their meaning.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it issued the *Order Amending Judgment on Remand* dated February 5, 2016 ("Supplemental Judgment") and when it denied the Club's motion for reconsideration in its order of February 22, 2016, without reopening the factual record and allowing discovery at any time during the remand proceedings, which erroneously prevented the Club from presenting relevant evidence about: (a) new circumstances that existed during the four year period between trial and remand proceedings and (b) fact questions raised by the new remedies sought by the County for the first time on remand.

2. The trial court erred when it issued the Supplemental Judgment and denied the Club's motion for reconsideration without fashioning remedies that reflect the Club's right to continue and intensify its nonconforming use, without making appropriate findings and conclusions to decide the scope of those rights, without reopening the record and allowing discovery regarding those rights, and without fashioning the remedies so they do not impinge on those rights but allow the Club to continue exercising them.

3. The trial court erred when it issued the Supplemental Judgment without fashioning remedies for expansions of the Club's nonconforming use so as to reflect this Court's conclusions regarding the activities and conditions that constituted the expansions.

4. The trial court erred when it issued the Supplemental Judgment and denied the Club's motion for reconsideration without issuing precisely tailored remedies that prohibit only what is required to eliminate the Club's expansions while allowing other activities that do not constitute an expansion, including the continuation and intensification of the nonconforming use.

5. The trial court erred in issuing the Supplemental Judgment without fashioning remedies that are specific and precise enough in their terms so

as to clearly describe, without reference to any other document, the act or acts sought to be restrained or performed.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. When a plaintiff seeks new expansion remedies on remand that it never sought at trial and new, relevant evidence is available regarding circumstances during the four years between trial and remand proceedings, must the trial court reopen the record to allow the defendant an opportunity for discovery and a factfinding hearing and to make appropriate findings and conclusions pursuant to the civil rules of procedure before granting any such remedy? (Assignment of Error 1.)

B. When the Court of Appeals instructs the trial court to fashion new remedies for expansions of a nonconforming use that reflect a landowner's right to continue and intensify the nonconforming use, when the scope of that right was never decided, and when that scope depends on the facts, must the trial court allow discovery and a factfinding hearing to decide fact issues, make appropriate findings and conclusions to delineate those rights, and fashion remedies that allow the landowner to continue exercising them? (Assignment of Error 2.)

C. When the Court of Appeals concludes certain patterns of activities or conditions associated with a nonconforming use constitute expansions and then remands the case with instructions for the trial court to fashion

new remedies for those expansions, must the remedies reflect the Court of Appeals' conclusions regarding what constitutes the expansions? (Assignment of Error 3.)

D. When a trial court decides to remedy expansions of a nonconforming use through a declaratory judgment and injunctions, must those remedies be precisely tailored to prohibit only what is required to eliminate the expansions without prohibiting activities that do not constitute an expansion, including the continuation and intensification of the nonconforming use? (Assignment of Error 4.)

E. When a trial court decides to remedy expansions of a nonconforming use and site development permitting violations through a declaratory judgment and injunctions, must those remedies be specific and precise enough so as to clearly describe, without reference to any other document, the act or acts sought to be restrained or performed? (Assignment of Error 5.)

IV. STATEMENT OF THE CASE

A. Background Summary

This case was previously before the Court in case number 43076-2-II, resulting in the Published Opinion. *Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014) ("*KRRC*" or "Published Opinion"). The Published Opinion provides a detailed

summary of the facts leading up to the fall 2011 bench trial, and it includes the Court's numerous legal conclusions and instructions to the trial court regarding how to fashion remedies on remand. *See generally*, *id.* at 262–304. The Club incorporates the entire Published Opinion as relevant background and presents the additional summary of facts below.

The Club has operated an outdoor shooting range at its current location since it was chartered for "sport and national defense" in 1926. *Id.* In 1993, the County acknowledged the range was grandfathered as a nonconforming use. *Id.* at 262–63.

Beginning in approximately 2005 or 2006, sound emanating from the Club increased to a level that began to disrupt neighbors. *Id.* at 263; CP (2012) at 4073–74 (finding, at the time of trial, an "increase in the noise level emanating from the Club in the past five to six years"). "Shooting sounds changed from 'occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and short in duration.'" *KRRC*, 184 Wn. App. at 263 (citing CP (2012) at 4073). Although the frequency and sound levels changed, the "types of weapons and shooting patterns [did] not necessarily involve a different character of use than in 1993, when similar weapons and shooting patterns were used infrequently." *Id.* at 274.

The County initiated this lawsuit in September 2010, alleging the Club had unlawfully expanded its nonconforming use, had improved its facility without required site development permits, and had been maintaining a public nuisance due to noise and safety concerns. *KRRC*, 184 Wn. App. at 265. After a bench trial in the fall of 2011, the trial court issued a declaratory judgment and injunction that fully terminated the Club's nonconforming use ("termination remedies"), effectively shutting it down indefinitely.

The trial decision also includes a second injunction that prohibits:

> "1. Use of fully automatic firearms, including but not limited to machine guns;
>
> 2. Use of rifles greater than nominal .30 caliber;
>
> 3. Use of exploding targets and cannons; and
>
> 4. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening."

CP (2016) at 203.

This second injunction does not prohibit "practical shooting" or use of "weaponry greater than .30 caliber." The County did not request these remedies in its third amended complaint (which was the operative pleading at trial) or its trial brief. CP (2016) at 90, 106 (third amended complaint); CP (2012) at 1910, 1942 (County's trial brief).

Likewise, the County's closing argument brief does not ask the trial court to enjoin "practical shooting."[2] The only request in that brief related to calibers was for the trial court to prohibit all "rifles greater than nominal .30 caliber." CP (2016) at 1348 (quoting Kitsap County's closing argument brief). The County made it clear it was not seeking any other caliber restrictions, writing:

> "**If the Court allows shooting to continue at KRRC at all, it should draw a line for rifles**: No rifles of greater than nominal .30 caliber should be allowed. Unlike .308 hunting rifles for instance, the Club can articulate no utility for the .50 cal. rifles, and the sound of this rifle cannot be described as anything other than an unacceptable intrusion into the comfort and repose of nearby residents' lives. Shooting a .50 cal. BMG may be a thrill for some of the Club's users, but the noise from shooting this cartridge type creates an impact that outweighs what can only be described as entertainment for the shooter."

Id. (emphasis added). As stated, the County wanted to prohibit rifles greater than nominal .30 caliber in order to stop the use of ".50 cal. rifles," which made a sound the County considered unreasonably intrusive upon nearby residents.

After trial, the Club appealed. This Court concluded there was no legal basis for the termination remedies and reversed them, reinstating the Club's nonconforming use right and allowing it to reopen. *KRRC*, 184

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[2] The Club filed a complete copy of the County's closing argument brief with this Court as an exhibit in support of the Club's July 14, 2016 motion to stay. *Decl. of B. Foster (July 13, 2016)* ¶ 3, Ex. 2 at 21.

Wn. App. at 300–01. The Court affirmed the second trial injunction, however, holding it was "reasonably related to the noise-related nuisance and possibly to the safety-related nuisance." *Id.* at 302. This "noise nuisance injunction" was in effect throughout the 2015–16 remand proceedings and remains in effect today as a remedy for the public sound and safety nuisances affirmed by this Court in the Published Opinion. The County never appealed the sufficiency of that remedy.

B. The Club's Two Expansions

One of the trial court's reasons for granting the termination remedies was its conclusion that the Club had unlawfully expanded its land use beyond what its nonconforming use right allowed. *KRRC*, 184 Wn. App. at 302. On appeal, the Club argued it had not expanded at all but had only intensified, which the law allows. *Id.* at 268.

The Court agreed the law has always allowed intensification of the Club's nonconforming use. *Id.* at 268. It then held that whether a set of conditions or activities constitutes a prohibited expansion as opposed to a permissible intensification is a question of law. *Id* at 272. It concluded the Club had expanded beyond its right to continue and intensify its nonconforming use, but only in <u>two</u> specific ways: (1) "commercial use of the property (including military training)" and (2) "dramatically increased

noise levels." *Id.* at 261, 268, 272–74, 303. As a matter of law, there were no other expansions to remedy.

Because the difference between an expansion and a permissible continuation or intensification of a nonconforming use is a question of law, the Published Opinion contains legal conclusions that describe the Club's sound and commercial military training expansions. *Id.* at 263–64, 272–74.

C. The Sound Expansion

In its summary of "Property Usage Since 1993," the Court concluded that

> "expanded hours, commercial use, use of explosive devices and higher caliber weaponry, and practical shooting competitions increased the noise level of the Club's activities beginning in approximately 2005 or 2006. Shooting sounds changed from 'occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration.' The noise from the Club disrupted neighboring residents' indoor and outdoor activities."

KRRC, 184 Wn. App. at 263–64 (citing CP (2012) at 4073) (emphasis added).

Later, in defining the sound expansion, the Court concluded "that the *frequent and drastically increased* noise levels found to exist at the Club constituted a fundamental change in the use of the property and that this change represented a use different in kind than the Club's 1993

property use." *Id.* At the same time, it was careful to point out that the "types of weapons and shooting patterns used currently do not necessarily involve a different character of use than in 1993, when similar weapons and shooting patterns were used infrequently." *Id.* at 274. It also held that the Club's policy of allowing shooting from 7 am to 10 pm was a permissible intensification. *Id.* at 303.

What this all means is that the hours of shooting, types of weapons, and shooting patterns used at the Club were not expansions. The expansion consisted of some still unquantified increase in the number and volume of sounds coming from the Club beginning around 2005 or 2006.

D. The Commercial Military Training Expansion

The second expansion was due to commercial use of the property for military training. In its summary of "Property Usage Since 1993," the Court concluded,

> "Commercial use of the Club also increased, including private for-profit companies using the Club for a variety of firearms and small arms training exercises for military personnel. The U.S. Navy also hosted firearms exercises at the Club once in November 2009."

KRRC, 184 Wn. App. at 263.

The Court then described the commercial military training expansion, making reference to the trial court's findings "that from 2002 through 2010 three for-profit companies regularly provided a variety of

firearms courses at the Club's property, many for active duty Navy personnel." *Id.* at 273. One of these companies "provided training for approximately 20 people at a time over three consecutive weekdays as often as three weeks per month from 2004 through 2010." *Id.*

Allowing use of the property "to operate a commercial business primarily serving military personnel" constituted "a fundamental change in use[.]" *Id.* It was "completely different in kind than using the property as a shooting range for Club members and the general public." *Id.* This "extensive commercial and military use" was an expansion. *Id.* at 274.

E. The Proper Remedy for Expansion

The Published Opinion explains why termination was not the correct remedy for the expansions and why the Club's nonconforming use was allowed to continue. "Nonconforming use status would have little value," wrote the Court, "if an expansion of that use would prevent the owner from continuing the lawful use in place before the expansion." *KRRC*, 184 Wn. App. at 299. "As time passes a nonconforming property use may grow in volume or intensity." *Id.* at 268. If it goes too far, "the [Kitsap County] Code allows a landowner to get back into conformity by re-tracting a prohibited expansion, enlargement, or change of use." *Id.* at 299. "Under the Code, the Club did have the right to continue its nonconforming use." *Id.* at 293.

Consistent with these rulings, the Court instructed the trial court that "[t]he appropriate remedy for the Club's expansion of its nonconforming use must reflect the fact that some change in use—'intensification'—is allowed and only 'expansion' is unlawful." *Id.* at 301 (emphasis added). This requires "specifically addressing the impermissible expansion of the Club's nonconforming use . . . while allowing the Club to operate as a shooting range." *Id.* at 262.

The intended meaning of these instructions and whether the trial court followed them are central issues in this appeal. The Club contends they were intended to result in remedies that would not only protect the County and its citizens from any further sound and commercial military training expansions by the Club, but also protect the Club from excessive and punitive restrictions imposed by the County and trial court.[3]

F. The Site Development Violations

The Published Opinion explained that the Club had

> "violated various code provisions by failing to obtain site development activity permits for extensive property development work—including grading, excavating, and filling—and failing to comply with the critical areas ordinance, KCC Title 19."

[3] *See Agronic Corp. of America v. deBough*, 21 Wn. App. 459, 464–65, 585 P.2d 821 (1978) ("The purpose of an injunction is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts.").

KRRC, 184 Wn. App. at 275. The Published Opinion disagreed with the Club's various arguments that it should have been excused from obtaining permits for its site development work. *Id.* at 262. The trial court had erroneously tried to remedy the site development violations by terminating the Club's nonconforming use. CP (2016) at 203 (termination remedies). Because the Court reversed the termination remedies, a new remedy was required. The Court therefore instructed the trial court to "fashion an appropriate remedy for the . . . permitting violations" on remand. *Id.*

G. The Trial Court's Refusal to Allow Discovery or Reopen the Record on Remand

On remand, the Club issued interrogatories to the County to discover the new remedies it would be seeking and any evidence it had to support them. CP (2016) at 229 (interrogatories). The Club also moved to reopen the record to present facts relevant to the sound expansion remedy. *Id.* at 370 (motion). The Club's operating conditions during appeal were different than before trial, creating a body of new evidence regarding sound levels under different conditions. *Id.* at 374–77. In addition, the noise nuisance injunction was an existing remedy for sound, which raised a question of fact about whether any additional remedy was needed to abate the sound expansion. *Id.* at 375, 377. The trial court responded by

quashing discovery and denying the Club's motion to reopen the record. *Id.* at 400, 910 (orders).

H. The Supplemental Judgment Issued On Remand

With no discovery allowed and no factfinding hearing, the trial court considered briefing and oral argument from the parties regarding how to fashion remedies on remand. The Club objected that the declaratory judgment and injunction remedies being sought by the County: (1) raised new fact questions that required discovery and reopening the record; (2) did not reflect the Club's right to continue and intensify its nonconforming use, as required by the Published Opinion; (3) contained or were based on conclusions of law that conflicted with the Published Opinion; (4) were not precisely tailored as required by Washington law; and (5) were impermissibly vague, ambiguous, and dependent on references to other documents for their meaning. CP (2016) at 1037–39, 1044, 1330–32, 1335. Over these objections, the trial court issued the Supplemental Judgment, generally granting each remedy sought by the County. *Id.* at 1339 (Supplemental Judgment).

1. The Declaratory Judgment

The Supplemental Judgment includes a declaratory judgment that sets forth the legal conclusions underlying the injunctions that were

intended to remedy the Club's expansions. The declaratory judgment states:

> "activities and uses of the Property consisting of military training uses; commercial, for-profit uses; and uses increasing noise levels by allowing explosive devises, higher caliber weaponry greater than .30 caliber and practical shooting, **each** constitute unlawful expansions of and changes to the nonconforming use of the Property as a shooting range[.]"

CP (2016) at 1341 (emphasis added).

The Club specifically objected that this declaratory judgment conflicted with the Published Opinion, which "did not hold that each of the listed types of activities was, in and of itself, an expansion of the nonconforming use." *Id.* at 1336. If the Club was to retract its expansions, as the Code and Published Opinion said it should, the expansions needed to be defined correctly.

2. The Sound Expansion Injunction

The Supplemental Judgment also includes a number of injunctions. To address the sound expansion, the trial court enjoined all "practical shooting, uses, including organized competitions and practice sessions," all "high caliber weaponry greater than .30 caliber," and all "explosive devices including exploding targets." CP (2016) at 1341.

Though the prohibition of all "practical shooting" was far from clear, the Club understood it was intended, at least in part, to prohibit

action shooting, where a participant inside a shooting bay fires rapidly, on the move, at targets in multiple locations. The Club specifically objected that evidence in the trial record proved action shooting was well established at the Club not only before the sound expansion began in 2005 or 2006 but also before the County acknowledged the Club's nonconforming use right in 1993. CP (2016) at 1031–34. The Club argued the amount of action or practical shooting that occurred before 2005 must be allowed as part of the Club's right to continue and intensify its nonconforming use. *Id.*; *id.* at 1034–35.

Evidence admitted by the Club during the bench trial showed that practical shooting practices, events, and competitions, including action shooting, occurred regularly at the Club since at least the early 1990s.[4]

Additional, undisputed evidence admitted at trial by the County further proved that, prior to 2005, the Club hosted regular practical shooting events and competitions affiliated with the United States

[4] *Id.* at 1051 (trial testimony of Club Executive Officer Marcus Carter describing action and practical shooting and identifying action shooting events that occurred at Club's property); *id.* at 1052 (describing use of Club's historic eight acres in 1993); *id.* at 1053 (describing how action shooting occurred in areas near current bays 1, 2, 3, and 4 in 1993); *id.* at 1054 (describing how action shooting occurred in areas near current bays 9, 10, and 11); *id.* at 1061–62 (testifying that the Club had hosted the annual "Courage Classic" charity competition since the early 1990s); *id.* at 1055–58 (testimony of Club witness Andrew Casella describing cowboy action shooting competitions that started around 1989); *id.* at 1059–60 (describing use of the Club for "jungle run" action shooting events in 1993); *see also id.* at 191 (FOF 83) (finding "Rapid-fired shooting" occurred, albeit infrequently, in the early 1990s).

Practical Shooting Association (USPSA) and International Practical Shooting Confederation (IPSC). *See* CP (2016) at 1063–64 (trial testimony describing USPSA and IPSC activities and shooting events). County witness Kevin Gross created two trial exhibits (152 and 153) that present the following summary of practical shooting competitions and events reported on the Club's website and newsletters from 2003 to 2010:

Overall Summary

	Year	Competitive Shooting Days	Courses	Military	Other Range Use	Total Events	
For year	2003	39	9	-	74	122	
For year	2004	40	6	-	73	119	
For year	2005	50	7	-	78	135	
For year	2006	54	24	-	97	175	
For year	2007	47	27	1	70	145	no data Sept., Oct. 2007
For year	2008	32	20	5	37	94	no data Feb.-June 2008
For year	2009	61	46	46	48	201	
For year	2010	105	57	12	88	262	
	Total	428	196	64	565	1,253	

Note: Military use of KRRC stopped apparently after April 2010.

Sources: KRRC Newsletters (The Bulletin) for Jan 2003 to June 2008 and KRRC website July 2008 to Dec. 2010.

CP (2016) at 1078 (Ex. 152); *id.* at 1065–68 (admitting Ex. 152). This summary shows a total of 122 events in 2003, 119 events in 2004, 135 events in 2005, and 175 events in 2006. *Id.* at 1078.

Trial exhibit 153 describes the types of shooting events and competitions referenced in trial exhibit 152, which included weekly USPSA and IPSC practices and competitions, in addition to other practical shooting events. *Id.* at 1081–1101; *id.* at 1068–69 (defining "IPSC"). The Club's newsletters from 2003 to 2005 describe the nature of these

practical shooting events and competitions in detail.[5] In 2003, Club members participated in IPSC 3-gun competitions where participants fired up to 200 rounds of ammunition from handguns, rifles, and shotguns at different targets placed in different locations.[6] Other practical shooting events and competitions prior to 2005 involved participants firing high-powered pistols at targets placed in multiple directions.[7] These were the same type of shooting activities that had occurred at the property since the early 1990s.[8]

In spite of all this uncontroverted evidence, the trial court enjoined all "practical shooting, uses, including organized competitions and practice sessions" at the Club. CP (2016) at 1341. The trial court made no findings about the nature and scope of the Club's practical and action shooting activities before the sound expansion began in 2005 or 2006, made no effort to allow those activities to continue, and did not appear to have fashioned a remedy that reflected the Club's right to continue and intensify its nonconforming use. *Id.*

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[5] *See* CP (2016) at 1130–1258 (*Decl. of Kevin T. Gross* ("Gross Decl.") and attached exhibits 38–52 from preliminary injunction proceeding). The Court admitted these materials as part of the trial record. CP (2016) at 1070–71.

[6] *Id.* at 1172–73 (Gross Decl., Ex. 40); *id.* at 1051; *id.* at 1054 (Marcus Carter's testimony regarding USPSA three-gun competitions).

[7] *Id.* at 1213–14 (Gross Decl., Ex. 46).

[8] *Id.* at 1074 (testimony of Jeffrey Hayes regarding his participation in 1991 or 1992 USPA competition at Club); *id.* at 1207 (Gross Decl., Ex. 45) (referencing 1995 IPSC match at Club's property).

As an additional remedy for the sound expansion, the trial court enjoined the use of all "weaponry greater than .30 caliber" at the Club. *Id.* at 1341. Having been denied discovery and a factfinding hearing, the Club pointed out that rifles greater than "nominal .30 caliber" were already prohibited by the noise nuisance injunction and argued the Club's right to continue and intensify should include weaponry and calibers used before 2005 or 2006. *Id.* at 1037–38. The trial court again made no findings regarding sound or intensification and prohibited all "high caliber weaponry greater than .30 caliber." *Id.* at 1341.

In a motion for reconsideration, the Club presented the declaration of Executive Officer Marcus Carter attesting that the vast majority of firearms used at the Club since at least 1988 or 1989 had exceeded 30 caliber. *Id.* at 1357–59. The declaration also explained there is no direct relationship between the caliber of a firearm and the amount of sound it produces. *Id.* at 1357. The declaration discussed the many common handguns, shotguns, air rifles, and even arrows that appeared to be prohibited by the new ban on "weaponry greater than .30 caliber," including common firearms like the "30 ought 6" (aka "30-06"), "30-30," and "3 oh 8" (aka "308") rifles, in addition to .357, 45 caliber, and 9 millimeter pistols, all commonly owned and used by the public, law enforcement, and others. *Id.* at 1359. The motion for reconsideration also

objected that the County had never sought to enjoin all "weaponry greater than .30 caliber" prior to remand, which was an additional reason why the trial court should have reopened the record before fashioning any remedy, to allow the Club to present evidence in opposition. *Id.* at 1346. The trial court's order said the court had considered the uncontroverted declaration but denied reconsideration. *Id.* at 1363.

The third injunction issued on remand to remedy the sound expansion was the prohibition on all "explosive devices including exploding targets." *Id.* at 1341. The Club objected that this remedy violated the Club's nonconforming use rights, was improperly tailored, vague, ambiguous, overbroad, and inconsistent with the portion of the noise nuisance injunction that prohibited all "exploding targets," without using the confusing term "explosive devices." *Id.* at 1330–31, 1335–36. The trial decision had specifically found that "Use of cannons or explosives was not common at the Club in approximately 1993," correctly implying they were used, albeit infrequently, at that time. *Id.* at 192 (FOF 87). In spite of this, the trial court enjoined all "explosive devices including exploding targets," again offering no indication of how this injunction reflected the Club's right to continue and intensify its nonconforming use. *Id.* at 1341.

/ / /

3. The Commercial Military Training Expansion Remedies

To remedy the commercial military training expansion, the trial court granted the County's request to enjoin all "[c]ommercial, for-profit uses" of the Club's property and all "[m]ilitary training uses." CP (2016) at 1341. The Supplemental Judgment does not define or clarify these broad, vague, and ambiguous terms.

The Club objected that the prohibitions were unclear and failed to "describe in reasonable detail . . . the act or acts sought to be restrained." *Id.* at 1331, 1335 (quoting CR 65(d)). The Club further objected that the prohibitions were overbroad, not "precisely tailored to prevent specific harms" and did not reflect this Court's conclusions in the Published Opinion regarding what constituted the commercial military training expansion. *Id.* (citing *DeLong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010)); *see also* CP (2016) at 1040.

The Club argued there were activities involving commercial businesses and military training that should be allowed at the Club because they were not part of the pattern of activities that constituted the expansion; activities such as "classroom-style lectures on tactics or equipment maintenance drills" and "training unrelated to use of the Club's shooting ranges for live-fire shooting exercises, commercial or otherwise,

such as if Club members wanted a for-profit firearm repair business to teach gunsmithing skills to students." CP (2016) at 1040.

The Club further argued that the remedy "should not prohibit the Club itself from hiring individuals or businesses to provide training" to Club members. *Id.* at 1041. The general public should also be included in this statement, as the Published Opinion recognized that using the property "as a shooting range for Club members and the general public" was not an expansion. *KRRC*, 184 Wn. App. at 273.

Again, the trial court chose not to clarify the vague terms of these injunctions. It chose not to tailor them to fit the conclusions in the Published Opinion or to allow activities with "commercial" or "military training" aspects to occur that were not expansions. The trial court appeared to make no effort to ensure the remedies reflected the Club's right to continue and intensify its operation. CP (2016) at 1341.

4. The Site Development Injunction

The Club objected that the site development remedy should identify the specific violations found to exist and the specific permits required by Kitsap County Code to resolve them. CP (2016) at 924–26. Later, the Club objected that CR 65(d) required the remedy to "describe in reasonable detail . . . the acts sought to be restrained." *Id.* at 1031.

To remedy the site permitting violations, the trial court issued an injunction

> "requiring Defendant to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment. Defendant's application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order."

Id. at 1342. This injunction references another document (the trial decision) for its meaning. It does not say what violations were "found to exist" in that decision or what permits the Club would need to apply for and obtain to remedy those violations.

I. Confusion and Events After Remand

Motion filings in this appeal reveal some of the extent to which the remand remedies have caused confusion and harm to the Club. After the Club posted the Supplemental Judgment in a visible location at the Club, attendance declined to less than 10% of what it had been in the past. *Decl. of M. Carter in Support of Mot. to Stay* ("Carter Decl.") ¶¶ 2, 4 (filed Jul. 14, 2016). The prohibitions on "weaponry greater than .30 caliber" and "practical shooting" were particularly devastating because many Club members and guests do not own a single firearm of less than 30 caliber and everyone who has ever used a firearm at the Club has done so for some "practical" purpose such as self defense, defense of others,

protection of property, protection of the state and nation, and hunting. *Id.* ¶¶ 7, 9, 12, 13.

Soon after the conclusion of the remand proceedings, the Kitsap County Prosecutor sent a letter to the Club dated May 6, 2016. *Id.* ¶ 15, Ex. 16. The letter purports to clarify that the term ".30 caliber" in the sound expansion remedy refers to "a type of bullet that is .30mm or slightly larger." *Id.* (emphasis added). If that were the meaning of the injunction, it would have banned every projectile that had ever been discharged at the Club, as all had a diameter exceeding *three-tenths of a millimeter*. *Id.* The letter also says some firearms greater than .30 caliber are allowed, so long as they are only "slightly larger," a vague "clarification" that is not based on any words in the injunction itself.

The letter increased uncertainty about the meaning of the remand remedies and suggests the Prosecutor still lacks basic knowledge about firearms, even after litigating this case for over six years. *Id.* The Club could have easily addressed this type of confusion and shared its expansive knowledge of firearms in a factfinding hearing, but the trial court denied it that opportunity.

As the Club's Executive Officer explained once again (based on more than 25 years of experience, certifications, and awards in shooting range operations, competitive shooting, gunsmithing, and firearms

instruction), there is no direct relationship between the caliber of a bullet or firearm and the volume of sound created by its discharge. Carter Decl. ¶ 8. The factors that determine the relative volume of sound when comparing two shots fired from two different firearms, all other things being equal, are the cartridge powder type and capacity, the barrel length, and the bullet weight. *Id.* Caliber does not determine any of these factors, and refers only to the diameter of a projectile or bore of a firearm. *Id.*

With this appeal pending, Commissioner Schmidt granted the Club's motion to stay the prohibitions on "practical shooting," use of "weaponry greater than .30 caliber," "commercial, for-profit uses," and "military training uses." *Ruling by Comm'r Schmidt* (filed Aug. 4, 2016). He wrote that the Club had demonstrated "debatable issues as to whether the activities prohibited by the supplemental judgment are permissible intensifications of use or impermissible expansions of use." *Id.* He also opined that the restriction on caliber size was "unsupported by evidence of a relationship between caliber size and noise level and thus is unduly burdensome." *Id.* He agreed the term "practical shooting" is undefined and ambiguous as used in the Supplemental Judgment and is therefore unduly burdensome, and that prohibiting "commercial or for-profit uses burdens the financial viability of the Club pending appeal." *Id.*

When the County moved to modify and lift Commissioner Schmidt's stay order, the Court denied the motion. *Order Denying Mots. to Modify* (filed Nov. 7, 2016).

V. ARGUMENT

A. The Trial Court Erred When It Issued Expansion Remedies Without Reopening the Record, Allowing Discovery and a Factfinding Hearing, and Making Appropriate Findings and Conclusions Regarding New Issues in Dispute.

A trial court's ruling on whether to reopen a case for the introduction of new evidence is reviewed for an abuse of discretion. *In re Ott*, 37 Wn.App. 234, 240, 679 P.2d 372 (1984). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Ameriquest Mortg. Co. v. Office of Attorney General*, 177 Wn.2d 467, 478, 300 P.3d 799 (2013). According to one of Washington's leading authorities on civil procedure, Washington trial courts reopen the record on remand to admit additional evidence if it was not available at the time of trial, could not have been adduced with reasonable diligence prior to trial, and would not be cumulative of evidence in the record. 14A Tegland, Wash. Prac., Civil Procedure § 30:23 (2d ed.).

In *Rochester v. Tulp*, the trial court abused its discretion by refusing to reopen a case to admit additional evidence after entry of final

judgment based on a statute of limitations defense. 54 Wn.2d 71, 74, 337 P.2d 1062 (1959). The evidence showed the statute of limitations had not expired. *Id.* The trial court's refusal to consider this "decisive" evidence was an abuse of discretion. *Id.*

In *Sweeny v. Sweeny*, the Washington Supreme Court affirmed the trial court's decision to allow new evidence into the record on remand. 52 Wn.2d 337, 339, 324 P.2d 1096 (1958). The new evidence pertained to a child's welfare during the appeal, which was a "prime consideration" when fashioning the judgment on remand. *Id.* at 337–38, 340.

Federal courts also recognize the importance of reopening the record when fashioning remedies on remand, especially when a large amount of time has passed since trial. In *Stevens v. F/V Bonnie Doon*, the trial court reopened the record on remand to allow additional evidence relevant to carrying out the Court of Appeals' instructions. 731 F.2d 1433, 1436 (9th Cir. 1984). The Ninth Circuit affirmed, reasoning it would have been difficult to calculate the plaintiff's damages using only the evidence that had been presented at the initial trial. *Id.* at 1437; *see also*, *Carter Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 751 (6th Cir. 2001) (affirming trial court's decision to reopen record to allow evidence related to corporate veil piercing liability after the case was remanded for further proceedings on that issue).

The trial court's denial of the Club's motion to reopen the record prevented the Club from discovering and presenting new evidence from the four year period between the fall 2011 trial and the remand proceedings. Under the circumstances, this was an abuse of discretion.

When the case was remanded, the Club had operated for several years under limitations imposed by this Court as part of its April 2012 stay order that were very similar to the limitations in the second injunction. CP (2016) at 307, 312. There were also newly available facts surrounding a sound study conducted by a County expert while that stay order was in effect, who collected data from locations outside the Club while the Club's shooting bays were being used for a practical pistol and rifle shooting competition. *Id.* at 386.

This type of evidence was particularly relevant given that the "purpose of an injunction is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts." *Agronic Corp. of America v. deBough*, 21 Wn. App. 459, 464–65, 585 P.2d 821 (1978). If the Club had proven the sound expansion was already abated, no additional expansion remedy should have been issued at all.

The circumstances supporting a reopening of the factual record also included the fact that the County was seeking new remedies it had never sought at trial. If the County had sought the same injunction

remedies at trial that it had sought on remand, the record might have already contained all relevant evidence and all of the operative questions of fact might have already been answered. That was not the case.

If the trial court had reopened the record, the Club's new evidence would have addressed the commercial military training expansion as well as the sound expansion. A declaration filed by the Club in support of its most recent motion to stay, for example, explains that the range relies on "third-party commercial or for-profit businesses to provide necessary services such as sanitary service, water service, firearms registration, and other management and educational services." Carter Decl. ¶ 16 (filed July 14, 2016). The Supplemental Judgment appears to prohibit those practices, and even appears to prohibit the Club from paying private firearm instructors to provide classes to Club members and guests, even though such use of the property has never been deemed an expansion.

Before granting any injunction, a court must balance the relative interests of the parties and the public. *Tyler Pipe Indus., Inc. v. State Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). A trial court abuses its discretion if it imposes a summary injunction without proper consideration of the fact-driven inquiries inherent in balancing the burdens on the parties. *Steury v. Johnson*, 90 Wn. App. 401, 407, 957 P.2d 772 (1998). Another fact issue raised by any injunction is whether it is

precisely tailored to remedy a specific, proven harm without prohibiting lawful conduct. *DeLong v. Parmelee*, 157 Wn. App. 119, 150 (2010), *rev. granted, cause remanded*, 171 Wn.2d 1004 (2011); *Chambers v. City of Mt. Vernon*, 11 Wn. App. 357, 361, 522 P.2d 1184 (1974). It was an abuse of discretion for the trial court to disregard these issues or decide them summarily without allowing the Club to discover and present the relevant facts at a factfinding hearing.

Because the Club should have been afforded an opportunity to litigate the new and relevant facts, it also should have been given an opportunity for discovery. Washington places paramount value in a litigant's right to discovery. *See Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782–83, 819 P.2d 370 (1991). In *Puget Sound Blood Center*, the Washington Supreme Court explained, "it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Id.*

In another case, the Court of Appeals held that the trial court abused its discretion when it imposed the most severe discovery sanction, excluding evidence, without considering lesser sanctions on the record which could have addressed any limited prejudice caused by delay. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 70–71, 155 P.3d 978 (2007). *Peluso* shows that quashing discovery is a severe

sanction only appropriate in an exceptional case. Because the record must be reopened, the Club should also be given an opportunity to conduct discovery pursuant to the civil rules.

During oral argument on remand in this case, the trial judge revealed that she "did not want a massive set of completely new findings because the Court of Appeals did not tell [her] to do that." RP vol. 4, 10:11 (Feb. 5, 2016). This comment belied the fact that the Published Opinion did not instruct the trial court one way or the other as to whether the factual record needed to be reopened.

The trial court erred and abused its discretion when it issued remedies for expansion without reopening the record, allowing discovery and a trial-type factfinding hearing, and making appropriate findings and conclusions regarding the issues in dispute pursuant to the civil rules. The expansion remedies should be reversed and the case remanded with instructions for the trial court to correct these errors.

B. The Trial Court Erred When It Issued Expansion Remedies Without Reopening the Record, Allowing Discovery and a Factfinding Hearing, and Making Appropriate Findings and Conclusions Regarding the Club's Right to Continue and Intensify

One of the most important decisions in the Published Opinion was that the Club retained its right to continue and intensify its nonconforming use. This Court reinstated the Club's nonconforming use right, instructed

the trial court to "specifically address[ ]" and "fashion an appropriate remedy" for the sound and commercial military training expansions, and stated the remedies "must reflect" the Club's right to intensify. *KRRC*, 184 Wn. App. at 252, 262.

Under RAP 2.5(c) "Rule of the Case" doctrine, the holdings of the Court on a prior appeal are binding until they are "authoritatively overruled." *Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966). On remand, the trial court acknowledged it was required to abide by and effectuate the decisions of this Court in the Published Opinion, saying:

> "The Court of Appeals decision trumps everything, clearly. . . . What they say goes. And so if there are words in the ultimate order that I enter that are not consistent with their findings and their order to me, their order governs."

RP vol. 4, 10:5–10 (Feb. 5, 2016). None of this Court's decisions in the Published Opinion have been overruled. Therefore, the Published Opinion provided the rule of the case on remand and still does today.

To effectuate this Court's instructions, the trial court should have allowed discovery and a factfinding hearing to resolve questions regarding the scope of the Club's right to continue and intensify.[9]

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[9] In addition to the fact questions discussed in Part V.A, *supra*, fact-related questions that should have been resolved through discovery and a factfinding hearing on remand include:

Alternatively, the trial court should have considered the evidence already in the trial record regarding the Club's activities (or frequency of activities) that were not expansions. Those activities included hundreds of practical or action shooting competitions, the use of a wide variety of common "weaponry greater than .30 caliber," and the occasional use of exploding targets. *See supra*, Part IV.H.2. Any remedy for the expansions should not have prohibited those activities or levels of activities from occurring at the Club. The trial court disregarded all this.

This error is not limited to the sound expansion remedies. During the early 1990s, U.S. military personnel conducted firearm qualification exercises at least once. CP (2016) at 189 (FOF 72).

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(1) What sound producing activities should be allowed to continue on the grounds that they occurred before the sound expansion began in 2005 or 2006?

(2) What was the frequency of those activities before 2005 or 2006?

(3) What were the characteristics of sounds from the Club before 2005 or 2006?

(4) What is the relationship, if any, between sound and the caliber of a firearm?

(5) What is the relationship, if any, between sound and "practical shooting"?

(6) What is the relationship, if any, between sound and "explosive devices"?

(7) What do the vague and ambiguous terms used in the expansion remedies, such as "practical shooting" and "commercial, for-profit uses," really mean?

(8) What "military training" or "commercial, for-profit uses" of the Club are not expansions?

In addition, the Club pointed out there were activities involving commercial businesses and military training that should be allowed at the Club because they were not part of the pattern of activities that constituted the expansion and instead constitute permissible use of the property "as a shooting range for Club members and the general public." *See supra*, Part IV.H.3 (citing CP (2016) at 1041; *KRRC*, 184 Wn. App. at 273). The trial court should have fashioned a remedy that allowed those types of activities to occur. Instead, it issued broad and vague prohibitions on all "military training" and "commercial, for-profit uses," which do not reflect the Club's right to continue and intensify.

The trial court's failure to follow the instructions in the Published Opinion is a legal error that requires reversal of the expansion remedies. In addition, the trial court should be instructed to reopen the record and allow discovery and a factfinding hearing before making appropriate findings and conclusions to decide the scope of the Club's rights and the activities they protect. This is not too much to ask of the trial court or County, given that they first erroneously terminated the Club's nonconforming use right and are now seeking to impose new remedies on the Club that were not at issue during the fall 2011 trial.

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C. The Expansion Remedies Do Not Reflect This Court's Conclusions Regarding What Constituted the Expansions.

The declaratory judgment concludes that certain activities and uses of the Club's property "each constitute unlawful expansions" (as opposed to lawful intensifications or continuations of the nonconforming use). "[T]he expansion/intensification determination is a question of law." *KRRC*, 184 Wn. App. at 272. Because the declaratory judgment and injunctions intended to remedy the expansions are based on erroneous legal conclusions that conflict with the conclusions in the Published Opinion about what constituted the expansions, they must be reversed.

A trial court's conclusions of law are reviewed de novo. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833–34, 161 P.3d 1016 (2007); *Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359 (1990). Declaratory relief that constitutes a legal conclusion is reviewed de novo. *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301 P.3d 45 (2013) (citing *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001)).

The terms of an injunction are normally reviewed under an abuse of discretion standard. *KRRC*, 184 Wn. App. at 297; *State v. Kaiser*, 161 Wn. App. 705, 726, 254 P.3d 850 (2011). Questions of law underlying an injunction, however, are reviewed de novo. *Dix*, 160 Wn.2d at 833–34. If

a trial court's order is based on an "erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion." *Id.* In addition, injunctive relief cannot be upheld if it is based upon untenable grounds, manifestly unreasonable, or arbitrary. *Dependency of Q.L.M. v. State Dept. of Social and Health Svcs.*, 105 Wn. App. 532, 537–38, 20 P.3d 465 (2001).

The declaratory judgment states:

> "activities and uses of the Property consisting of military training uses; commercial, for-profit uses; and uses increasing noise levels by allowing explosive devises, higher caliber weaponry greater than .30 caliber and practical shooting, **each** constitute unlawful expansions of and changes to the nonconforming use of the Property as a shooting range[.]"

CP (2016) at 1341 (emphasis added). Based on this ruling, all "practical shooting," all use of "weaponry greater than .30 caliber," all use of "explosive devices," all "military training uses," and all "commercial, for-profit uses" are each expansions. This is contrary to the Published Opinion.

The Published Opinion concluded the Club had exceeded its nonconforming use right prior to trial by expanding, but only in two specific ways: (1) "increased noise levels" "beginning in approximately 2005 or 2006" (the "sound expansion"); and (2) "extensive" for-profit use of the property between 2002 and 2010 "to operate a commercial business

primarily serving military personnel" (the "commercial military training expansion"). *Id.* at 261, 268, 272–74, 300–01, 303. The Published Opinion also concluded that the hours of shooting, types of weapons, and shooting patterns at the Club were not expansions. *See supra*, Part IV.C.

The trial court committed legal error when it asserted different legal conclusions in its declaratory judgment. Based on these legal conclusions, the trial court enjoined each of the listed activities at the Club property. *Id.* The trial court's failure to fashion remedies consistent with the conclusions in the Published Opinion is an error that requires reversal.

In issuing these erroneous remedies, the trial court apparently adopted the County's mis-reading of the Published Opinion. Their confusion may arise from the following passage in the Published Opinion:

> "The Club argues that the trial court erred in ruling that the Club engaged in an impermissible expansion of the existing nonconforming use by (1) increasing its operating hours; (2) **allowing commercial use of the Club (including military training**); and (3) **increasing noise levels** by allowing explosive devices, higher caliber weaponry greater than .30 caliber, and practical shooting. We hold that increasing the operating hours represented an intensification rather than an expansion of use, but agree that the other **two categories** of changed use constituted expansions of the Club's nonconforming use."

KRRC, 184 Wn. App. 252, 268 (2014) (emphasis added); *see also id.* at 273–74.

This passage does refer to "explosive devices, higher caliber weaponry greater than .30 caliber, and practical shooting." It does not, however, say that each of those activities was an expansion. This passage and others in the Published Opinion clearly state it was the increased *sound* or noise that was the expansion. *Id.* at 261, 268, 272–74, 303.

The Published Opinion correctly concluded the "types of weapons and shooting patterns [did] not necessarily involve a different character of use than in 1993, when similar weapons and shooting patterns were used infrequently." *Id.* at 274. Increases in the frequency of these activities, or other changes, may have caused sound to become an expansion beginning in 2005 or 2006. That does not mean they can be prohibited outright. If their increased frequency was the source of the sound expansion, the frequency with which they occurred before 2005 should have been found on remand and allowed to continue as a baseline. The trial record already contains copious evidence regarding the frequency of certain practical and action shooting events, and the Club could have presented more of this type of evidence had it been given the chance.

The trial court committed a similar error with respect to the commercial military training expansion. The Published Opinion held this expansion consisted of "extensive commercial and military use," "including private for-profit companies using the Club for a variety of

firearms courses and small arms training exercises" and "using the property to operate a commercial business primarily serving military personnel[.]" *Id.* at 263, 273 (emphasis added). This referred to the trial court's finding that "from 2002 through 2010 three for-profit companies regularly provided a variety of firearms courses at the Club's property, many for active duty Navy personnel." *Id.* "[O]ne company provided training for approximately 20 people at a time over three consecutive weekdays as often as three weeks per month from 2004 through 2010." *Id.* The Published Opinion contrasted these extensive for-profit activities with "using the property as a shooting range for Club members and the general public," which is allowed. *Id.* at 273–74.

Summarizing these findings and conclusions by saying that all "military training uses" and "commercial, for-profit uses" of the Club's property are each an expansion conflicts with the legal conclusions in the Published Opinion, as well as the trial court's own findings of fact. The declaratory judgment uses vague terminology, out of context, to prohibit activities that are part of the continuation and intensification of the nonconforming use.

In short, the trial court attempted to remedy the expansions by issuing prohibitive injunctions based on a declaratory judgment that contained legal conclusions about what constituted the expansions, but

those legal conclusions deviated from the careful determinations made by this Court in the Published Opinion. This was legal error, which requires reversal of the expansion remedies.

D. The Expansion Remedies Are Not Precisely Tailored to Reflect the Club's Right to Continue and Intensify.

The expansion remedies are also in error because they are not precisely tailored to reflect the Club's right to continue and intensify, as required by the Published Opinion and Washington law. An injunction is an extraordinary remedy that must be precisely tailored to prevent or remedy a specific, serious harm, without prohibiting lawful conduct. *DeLong v. Parmelee*, 157 Wn. App. 119, 150, 238 P.3d 936 (2010), *rev. granted, cause remanded*, 171 Wn.2d 1004, 248 P.3d 1042 (2011); *Chambers v. City of Mount Vernon*, 11 Wn. App. 357, 361, 522 P.2d 1184 (1974). Appellate courts reverse or modify injunctions that are overbroad and not precisely tailored to prevent a specific harm without unnecessarily prohibiting lawful activities.

In *Chambers v. City of Mount Vernon*, the Washington Court of Appeals reversed the injunction to the extent it prohibited "any" quarry operations and affirmed to the extent it prohibited "conducting the quarry operation . . . in such a way as to constitute a public nuisance." 11 Wn. App. 357, 361–62 (1974). There, an injunction shutting down an entire

quarry operation was improper because the enjoined activities themselves were lawful so long as they did not cause a public nuisance. *Id.* The appellate court remanded that case for the trial court to modify the findings of fact, conclusions of law, and the decree to only enjoin the quarry operations that were a nuisance while allowing other, lawful activities to continue. *Id.*

Here, as in *Chambers*, the trial court prohibited far more than was necessary, failing to precisely tailor the remedies. This was particularly erroneous because, according to the Published Opinion, a remedy for expansion could not "prevent the owner from continuing the lawful use in place before the expansion" and "the Code allows a landowner to get back into conformity by re-tracting a prohibited expansion, enlargement, or change of use." *KRRC*, 184 Wn. App. at 262, 299–301.

It also warrants consideration that the Club's nonconforming use right (with its right to intensify) is a vested property right that is protected by substantive due process. *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993); *King Cnty., Dept. of Dev. & Envtl. Servs. v. King Cnty.*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013). Similarly, the rights of the Club and its members under the Second Amendment of the United States Constitution and Article I, Section 24 of the Washington Constitution, which protect the right to bear arms, provide additional

reason to precisely fashion any expansion remedies. These rights should be restricted as little as possible.

In another similar case, *Mathewson v. Primeau*, the Washington Supreme Court dissolved an injunction prohibiting a family from raising pigs on their 13-acre property. 64 Wn.2d 929, 395 P.2d 183 (1964). The court found "no substantial evidence to support the finding that it is not possible to raise pigs on the defendants' property without interfering with the reasonable use of adjoining property." *Id.* at 937. The court reinstated a prior injunction that allowed the family to keep one boar, two brood sows, and an unlimited number of pigs up to six months of age. *Id.*

As in *Mathewson*, there is no basis to conclude it is impossible to allow any amount of the enjoined activities, however minimal, while still eliminating the expansions. The Published Opinion expressly concludes it was the change in the frequency of certain activities that constituted the sound expansion, not the advent of new firearms or shooting patterns.[10]

In *Christensen v. Hilltop Sportsman Club, Inc.*, the Ohio Court of Appeals reversed an injunction prohibiting shooting at a rifle club after neighbors brought a nuisance action alleging excessive noise. 573 N.E.2d 1183 (Ohio App. 1990). The prohibition was "excessive and far out of

[10] At minimum, the Club should have been allowed some baseline amount of practical shooting events, weaponry greater than 30 caliber, and other activities, consistent with its right to continue and intensify.

proportion" because it prevented the club's "reasonable use" of its property at "reasonable times." *Id.* at 1186. The court reversed with instructions for the injunction to prohibit "no more than is required to eliminate the nuisance." *Id.* (emphasis added). This Court should issue a similar instruction here with respect to the expansions.

The remedies for the sound and commercial military training expansions are overbroad and not properly tailored. To correct this, the Court should reverse these remedies and remand the case with instructions for the trial court to fashion narrowly tailored remedies supported by appropriate findings of fact and conclusions of law.

E. The Injunctions Are Impermissibly Vague, Ambiguous, Lacking in Detail, and Dependent on References to Other Documents for Their Meaning.

The remedies in the Supplemental Judgment for the expansions and the site development permitting violations should be reversed because they do not comply with CR 65(d). This rule requires that "[e]very order granting an injunction… shall set forth the reasons for its issuance; shall be specific in terms;" and "shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]" CR 65(d) (emphasis added).

"Federal Rule of Civil Procedure 65(d) is identical to CR 65(d) so cases interpreting the federal rule can be used for guidance." *All Star Gas,*

Inc., of Washington v. Bechard, 100 Wn. App. 732, 736–37 (2000). The Ninth Circuit applied FRCP 65(d) in *Federal Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263–64 (9th Cir. 1989), where it held an injunction against "future similar violations of the Federal Election Campaign Act of 1971," was "susceptible to more than one interpretation" and therefore failed to satisfy the "exacting requirements of [Federal] Rule 65(d)[.]" *Id.* at 1264. The court remanded that case "for a statement of the precise conduct prohibited by the injunction." *Id.*

According to the U.S. Supreme Court,

> "the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood."

Schmidt v. Lessard, 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974).

In *Borg-Warner Corp. v. York-Shipley, Inc.* (*Borg II*), 308 F.2d 839 (7th Cir. 1962), on a second appeal, the Seventh Circuit specified the exact terms of the injunction to be entered against the plaintiff because, upon remand after the first appeal, the district court had entered an injunction that was even broader in some respects than the first injunction that had been reversed. *Id.* at 840. The appellate court reversed the second injunction, fashioned specific terms for a new injunction, and

remanded with instruction for the trial court to include that language in a new judgment. *Id.*

Here, each of the remedies in the Supplemental Judgment fails to satisfy the exacting requirements of CR 65(d), providing additional grounds to reverse the remedies and remand the case with instructions for new remedies to be fashioned that are clear, specific, and not dependent on references to other documents for their meaning.

1. Sound Expansion Remedies

The sound expansion remedies prohibit all "high caliber weaponry greater than .30 caliber." The Prosecutor itself exhibited confusion about what this means by suggesting ".30 caliber" refers to ".30 mm" and by adding that firearms "slightly larger" than that size are not prohibited. Furthermore, this injunction is unclear in its application to other weaponry, including shotguns, bows and arrows, and air guns.

The prohibition on "practical shooting, uses, including organized competitions and practice sessions," is vague and ambiguous because the term "practical shooting" is vague, ambiguous, and not defined in the Supplemental Judgment. It could conceivably encompass any shooting that is intended to prepare the shooter for a real world situation, which is vritually all shooting at the Club. *See supra*, Part IV.I. The Club has used its shooting range since being chartered for "sport and national defense" in

1926, which are practical purposes. If the Club had been afforded a factfinding hearing, it could have presented and elaborated on this information for the trial court's benefit. It was not allowed to do so.

Still further, the comma between the words "practical shooting" and "uses" calls into question the meaning of the phrase, "practical shooting, uses, including organized competitions and practice sessions." It could be read to mean that all "uses" of the Club's property are prohibited.

The prohibition on all "explosive devices including exploding targets" is vague and ambiguous because it is unclear whether it refers to explosive devices that include exploding targets or whether it is referring to exploding targets as an example of an explosive device. In addition, the term "explosive devices" is vague and undefined, but on a gun range with different types of live ammunition, its meaning is critical. Kitsap County Code itself defines "firearm" to mean "any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion." Kitsap County Code 10.25.010(1) (emphasis added). This suggests the prohibition on explosive devices might apply to all firearms of any type.

2. Commercial Military Training Expansion Remedies

The remedies for the commercial military training expansion prohibit "Commercial, for-profit uses" and "Military training uses,"

without defining any of these broad, vague, and ambiguous terms. CP (2016) at 1341. These remedies are so unclear as to beg numerous questions,[11] leaving the Club and its members uncertain of their scope.

3. Site Development Injunction

The site development injunction requires the Club

> "to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment. Defendant's application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order."

CP (2016) at 1342. This injunction references another document (the trial decision) for its meaning. It does not say what violations were "found to exist" in that decision or what permits the Club would need to apply for and obtain to remedy those violations. It therefore violates CR 65(d).

VI. CONCLUSION

For the foregoing reasons, the declaratory judgment and injunctions in the Supplemental Judgment should be reversed and vacated, and the case should be remanded again with further instructions regarding how the trial court must fashion the remedies in question to avoid

[11] To give a few examples: Can the Club pay a private instructor to give firearm safety training or CPR training to its members or to the public at the Club? Can one Club member charge another for private live-fire or classroom safety training at the Club? Can a commercial for-profit vendor install a soda machine outside the Club office and collect money from it? Can a business sell t-shirts at an event it sponsors? If practicing with firearms improves their training, can military personnel use the Club at all, even when they are off duty?

repeating the errors it committed on remand. Specifically, the trial court should be instructed:

(a) to allow for discovery and a trial-type, factfinding hearing pursuant to the civil rules to resolve all of the still-undecided fact issues raised by the new remand remedies sought by the County and this Court's instructions regarding the fashioning of remedies to reflect the Club's right to continue and intensify;

(b) to make findings of fact and conclusions of law that delineate in specific terms the activities (and frequencies of activities) that fall within the Club's right to continue and intensify;

(c) to narrowly tailor any new expansion remedies to allow and not prohibit lawful activities, including those activities that fall within the Club's right to continue and intensify; and

(d) to make all new injunction remedies clear, unambiguous, and not tied to references in other documents for their meaning.

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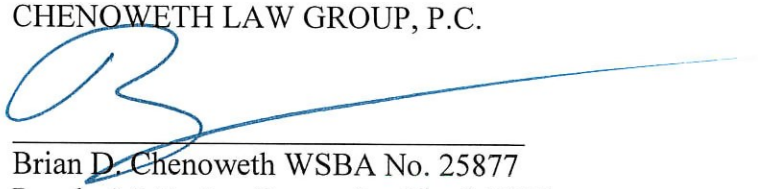
DATED: December 23, 2016.

CHENOWETH LAW GROUP, P.C.



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APPENDIX

Pursuant to RAP Rule 10.3(8) and 10.4(c), Appellant Kitsap Rifle and Revolver Club respectfully submits the attached Appendix.

10.25.010 Definitions.

The following definitions shall apply in the interpretation and enforcement of the ordinance codified in this article:

(1) "Firearm" means any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion. The term "firearm" shall include but not be limited to rifles, pistols, shotguns and machine guns. The term "firearm" shall not include devices, including but not limited to "nail guns," which are used as tools in the construction or building industries and which would otherwise fall within this definition.

(2) "Ordinary high water mark" means that mark on all lakes, streams and tidal water which will be found by examining the bed and banks in ascertaining where the presence and action of waters are so common and usual and so long continued in all ordinary years as to mark upon the soil a characteristic distinct from that of the abutting upland in respect to vegetation; provided, that in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide.

(3) "Range" means a place set aside and designated for the discharge of firearms for individuals wishing to practice, improve upon or compete as to their shooting skills.

(4) "Shoreline" means the border between a body of water and land measured by the ordinary high water mark.

(Ord. 515 (2014) § 2 (part), 2014)

CR 65

INJUNCTIONS

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or the adverse party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicants attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the applicant's claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall

dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. Except as otherwise provided by statute, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. Pursuant to RCW 4.92.080 no security shall be required of the State of Washington, municipal corporations or political subdivisions of the State of Washington. The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules are intended to supplement and not to modify any statute prescribing the basis for obtaining injunctive relief. These rules shall prevail over statutes if there are procedural conflicts.

14A Wash. Prac., Civil Procedure § 30:23 (2d ed.)

Washington Practice Series TM
Civil Procedure
August 2016 Update

Karl B. Tegland [a0]

G. Trial
Chapter 30. The Trial
C. Trial Procedure

§ 30:23. Reopening case

Reopening the case for further testimony after both parties have rested is within the discretion of the court. [1] Such discretion may also be exercised after motion for nonsuit or challenge to the evidence. [2]

The court may reopen the case for additional testimony although final argument has commenced, [3] and even after the case is submitted to the jury. [4]

Upon a remand from the Supreme Court for further proceedings to make a determination of factual issues and to enter judgment accordingly, the trial judge may reopen the case for further testimony. [5]

Unless there is a showing that the proffered additional testimony was newly discovered or that it could not, with reasonable diligence, have been adduced at the normal time, a refusal by the judge to reopen will seldom be held an abuse of discretion. [6]

And if the proffered evidence is cumulative, it is not an abuse of discretion to refuse to reopen. [7]

But it has been held to be an abuse of discretion to refuse to reopen the case where the trial judge terminated the case precipitously on a finding of no liability, and further evidence of liability would have occasioned only slight delay. [8]

The court in the exercise of its discretion may permit the reopening of voir dire examination of the jury. [9]

Footnotes

a0 Of The Washington Bar.

1 **Within discretion**
Goodner v. Chicago, M., St. P. & P. R. Co., 61 Wash 2d 12, 377 P.2d 231 (1962).
Burback v. Bucher, 56 Wash. 2d 875, 355 P 2d 981 (1960).
Zackovich v. Jasmont, 32 Wash. 2d 73, 200 P.2d 742 (1948).
Beadle v. Barta, 13 Wash. 2d 67, 123 P.2d 761 (1942); Godefroy v. Hupp, 93 Wash. 371, 160 P. 1056 (1916).

2 **After motion**
Edmonds v. Longview, P. & N. Ry. Co., 137 Wash. 254, 242 P. 19 (1926).

3 **Final argument commenced**
Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 P. 364 (1916).

4 **Submitted to jury**
Lueders v. Town of Tenino, 49 Wash 521, 95 P. 1089 (1908).

5

Upon remand

Sweeny v. Sweeny, 52 Wash. 2d 337, 324 P.2d 1096 (1958).

6

Seldom be held

Fuller v. Ostruske, 48 Wash. 2d 802, 296 P.2d 996 (1956). See, also, Tsubota v. Gunkel, 58 Wash. 2d 586, 364 P.2d 549 (1961) (evidence was matter of public record at time of trial).

7

Cumulative

Tsubota v. Gunkel, 58 Wash. 2d 586, 364 P.2d 549 (1961).

Williams v. Burrus, 20 Wash. App. 494, 581 P.2d 164 (Div. 1 1978).

8

Slight delay

Glass v. Carnation Co., 60 Wash. 2d 341, 373 P.2d 775 (1962) (the trial judge dismissed the case when he felt no liability was shown, without waiting for evidence of damages).

9

Voir dire

State v. Farley, 48 Wash. 2d 11, 290 P.2d 987 (1955).

End of Document

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KITSAP COUNTY, a political subdivision of the State of Washington,

Plaintiff,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE ROES I-XX, inclusive,

Defendants,

and,

IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton Washington.

NO. 10-2-12913-3

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

THIS MATTER having come on regularly for trial before the undersigned Judge of the above-entitled Court, and the matter having been tried to the bench; presentation of preliminary motions and evidence commenced on September 28, 2011 and concluded on October 27, 2011; the Court allowed submission of written closing arguments and submissions of Findings of Fact

and Conclusions of Law no later than 9:00 a.m. on November 7, 2011. The parties' briefs and proposed Findings of Fact were received timely; the parties appeared through their attorneys of record Neil Wachter and Jennine Christensen for the Plaintiff and Brian Chenoweth and Brooks Foster for the Defendant; and the Court considered the motions, briefing, testimony of witnesses, argument of counsel, proposed Findings of Fact and Conclusions of Law, and the records and files herein, and being fully advised in the premises, now, therefore, makes the following findings of fact, conclusions of law and orders, which shall remain in effect until further order of this court:

I. FINDINGS OF FACT

JURISDICTION

1. All events cited in these Findings took place in unincorporated Kitsap County, Washington, except where noted. Port Orchard is the county seat for Kitsap County, and references to official action by the Kitsap County Board of County Commissioners ("BOCC") or to meetings or BOCC proceedings at the Kitsap County Administration Building refer to events at County facilities located in Port Orchard, except where noted to the contrary.

2. On October 22, 2010, the Court denied defendant Kitsap Rifle and Revolver Club's motion to change venue in this action, finding that the Pierce County Superior Court has jurisdiction over the parties and is the proper venue for the action pursuant to RCW 2.08.010 and RCW 36.01.050. The Court denied the motion without prejudice, and the defendant did not renew its motion.

PARTIES

3. Plaintiff Kitsap County ("County") is a municipal corporation in and is a political subdivision of the State of Washington.

4. Defendant Kitsap Rifle and Revolver Club ("KRRC" or "the Club", more particularly described below) is a Washington non-profit corporation and is the owner of record of the subject property, which is located at 4900 Seabeck Highway NW, Bremerton, Washington (hereinafter referred to as the "Property") and more particularly described as:

36251W

PART OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER AND PART OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER, SECTION 36, TOWNSHIP 25 NORTH, RANGE 1 WEST, W.M., KITSAP COUNTY, WASHINGTON, LYING NORTHERLY OF THE NORTH LINES OF AN EASEMENT FOR RIGHT OF WAY FOR ROAD GRANTED TO KITSAP COUNTY ON DECEMBER 7, 1929, UNDER APPLICATION NO. 1320, SAID ROAD BEING AS SHOWN ON THE REGULATION PLAT THEREOF ON FILE IN THE OFFICE OF THE COMMISSIONERS OF PUBLIC LANDS AT OLYMPIA, WASHINGTON.******IMPROVEMENTS CARRIED UNDER TAX PARCEL NO. 362501-2-002-1000******

5. Defendant Sharon Carter (d/b/a "National Firearms Institute") was dismissed from this action on February 14, 2011 upon Plaintiff's motion. No other defendants have been named.

KRRC

6. Defendant Kitsap Rifle and Revolver Club (the "Club" or "KRRC") is a non-profit organization founded by charter on November 11, 1926 for "sport and national defense." Exhibits 475–76. It was later incorporated in 1986. Exhibit 271.

7. From its inception, the Club occupied the 72-acre parcel (the "Property") identified above. For many decades, the Club leased the Property from the Washington State Department of Natural Resources ("DNR"). Exhibits 135–36.

8. The Property consists of approximately 72 acres, including approximately eight acres of active or intensive use and occupancy containing the Club's improvements, roads, parking areas, open shooting areas, targets, storage areas, and associated infrastructure

("Historical Eight Acres"). Exhibits 135-36, 438, 486. The remaining acreage consists of timberlands, wetlands and similar resource-oriented lands passively utilized by the Club to provide buffer and safety zones for the Club's shooting range. Id.

ZONING

9. The property is zoned "rural wooded" under Kitsap County Code Chapter 17.301. The Property has had this same essential zoning designation since before the year 1993.

10. On September 7, 1993, then-BOCC Chair Wyn Granlund authored a letter to the four shooting ranges in unincorporated Kitsap County at the time, stating that the County recognized each as "grandfathered." Exhibit 315.

THE SUBJECT PROPERTY - OWNERSHIP, LEASES AND DNR USES

11. Until June 18, 2009, the 72-acre subject property was owned by the State of Washington Department of Natural Resources ("DNR"). DNR owned several contiguous parcels to the north of the subject property, and managed parts of these contiguous properties and parts of the subject property for timber harvesting. DNR leased the Property to KRRC under a series of lease agreements, the two most recent of which were admitted into evidence. Exhibits 135 and 136. The lease agreements recite that eight acres of the property are for use by the Club as a shooting range and that the remaining 64.4 acres are for use as a "buffer". The lease agreements do not identify the specific boundaries of these respective areas. Id.

12. Prior to the instant litigation, the eight acres of the property claimed by KRRC to be its "historic use" area had not been surveyed by a professional surveyor or otherwise specifically defined.

13. Over the decades of its ownership of the Property and adjacent properties, DNR periodically conducted timber harvesting and replanting. The most recent DNR timber harvest on the Property was in approximately 1991, when the eastern portions of the Property were clear-cut and successfully replanted.

14. On June 18, 2009, deeds were recorded with the Kitsap County Assessor's Office transferring the Property first from the State of Washington to Kitsap County and immediately thereafter from Kitsap County to KRRC. The first deed was a quit claim deed transferring DNR land including the Property from the State to the County. Exhibit 146. The second deed was a bargain and sale deed ("2009 Deed") transferring the Property from the County to KRRC. Exhibit 147 (attached to these Findings of Fact).

15. For purposes of these factual findings, the Court will use the names the Club has given to shooting areas at the Property, which include a rifle range, a pistol range, and shooting bays 1-11 as depicted in Exhibits 251 and 251A (June 2010 Google earth imagery). The well house referenced in testimony is located between Bays 4 and 5 and the "boat launch" area referenced in testimony is west of Bay 8.

PROPERTY TRANSFER

16. For several years dating back to the 1990's, Kitsap County sought to acquire property in Central Kitsap County to be developed into a large greenbelt or parkland area. Prior to 2009, Kitsap County acquired several large parcels in Kitsap County for use in a potential "land swap" with the State DNR. DNR owned several large parcels including the Subject Property, which were the object of the County's proposed transaction ("DNR parcels").

17. In early 2009, negotiations with the State reached a stage when the DNR and the County began to discuss specific terms of the contemplated transaction. DNR informed the

County that it would be deeding the DNR parcels including the subject property to Kitsap County, so that the County would take over DNR's position as landlord to KRRC.

18. KRRC became aware that the County could become the Club's landlord as a result of the land swap and became concerned that the County might exercise a "highest and best use" clause in the lease agreements between the Club and DNR, so as to end the Club's use of the Property for shooting range purposes.

19. In March 2009, Club officials met with County officials including Commissioner Josh Brown, in an effort to secure the County's agreement to amend the lease agreement to remove the highest and best use clause. Soon after, the County and Club began discussing whether the County should instead deed the property to KRRC. KRRC very much wanted to own the property on which its shooting range was located and Kitsap County was not interested in owning the Property due to concern over potential heavy metals contamination of the Property from its use as a shooting range for several decades.

20. In April and May 2009, Club officers and club member/attorney Regina Taylor negotiated with Kitsap County staff members, including Matt Keough of the County Parks Department and Deputy Prosecuting Attorney Kevin Howell of the County Prosecutor's Office Civil Division. A bargain and sale deed was drafted by Mr. Howell, and the parties exchanged revisions of the deed until they agreed upon the deed's final terms.

21. At the County's request, certified appraiser Steven Shapiro conducted an appraisal of the KRRC property, which he published as a "supplemental appraisal report" dated May 5, 2009. Exhibit 279. This appraisal report presumed that the Property was lead-contaminated and that a $2-3 million cleanup may be required for the property. The appraisal report valued the Property at $0, based upon its continued use for shooting range purposes and

the potential costs of environmental cleanup. The appraisal did not split out values to be assigned to the "historic use" and "buffer" areas of the Property.

22. On May 11, 2009, the BOCC voted on and approved the sale of the Property from Kitsap County to the Club, pursuant to the terms of the 2009 Deed. Exhibit 147 (attached). The County did not announce or conduct a sale of the Property at public auction pursuant to Chapter 36.34 RCW because the County and KRRC relied upon the value from Mr. Shapiro's supplemental appraisal report.

23. The minutes and recordings of BOCC meetings on and around May 11, 2009 do not reveal an intent to settle disputed claims or land use status at the Property.

24. At the time of the property transaction, Kitsap County had no plan to pursue a later civil enforcement or an action based upon land use changes or site development permitting.

25. During the negotiation for the property transaction, the parties did not negotiate for the resolution of potential civil violations of the Kitsap County Code at the Property and the parties did not negotiate to resolve the Property's land use status.

THE BARGAIN AND SALE DEED

26. The only evidence produced at trial to discern the County's intent at the time of the 2009 Bargain and Sale Deed was the deed itself. While the Club argues in closing that ". . . the Commissioners decided to support the Club. . . ." (KRRC's Brief on closing Arguments, p.3), the Commissioners were not called as witnesses in the case and the parties' intent is gleaned from the four corners of the document. (Exhibit 147).

27. The deed does not identify nor address any then-existing disputes between the Club and the County, other than responsibility for and indemnification regarding environmental issues and injuries or death of persons due to actions on the range.

28. By virtue of the deed, the County did not release the Club from current or future actions brought under public nuisance or violation of County codes or violation of its historical and legal nonconforming uses.

PROPERTY USAGE - 1993 AND PRIOR

29. For several decades prior to 1993, the Club operated a rifle range and a pistol range at the Property. As of 1993, the pistol range consisted of a south-to-north oriented shooting area defined by a shooting shed on its south end and a back stop on the north end and the rifle range consisted of a southwest-to-northeast oriented shooting area defined by a shooting shed on its southwest end and a series of backstops going out as far as 150 yards to the northeast. As of 1993, the developed portions of the Property consisted of the rifle range, the pistol range, and cleared areas between these ranges, as seen in a 1994 aerial photograph (Exhibit 8). During and before 1993, the Club's members and users participated in shooting activities in wooded or semi-wooded areas of the Property, on the periphery of the pistol and rifle ranges and within its claimed eight-acre "historic use" area.

30. As of 1993, shooting occurred at the Property during daylight hours only. Shooting at the Property occurred only occasionally, and usually on weekends and during the fall "sight-in" season for hunters.

SITE DEVELOPMENT AT THE PROPERTY

31. On July 10, 1996, the Kitsap County Department of Community Development ("DCD") received from KRRC a "Pre-Application Conference Request" form, which was admitted as Exhibit 134. Under "project name", KRRC listed "Range Development – Phase I" and under "proposed use", KRRC stated:

> "Due to 50C-1993, KRRC is forced to enhance its operations and become more available to the general public. Phase I will include a water and septic system(s), a class room/community facility and a 200 meter rifle line. Material will not be removed from the premissis [sic]; it will be utilized for safety berms and acoustical baffeling [sic]. These enhancements will allow KRRC to generate a profit to be shared with the State School Trust (DNR). Local business will also profit from sportsmen visiting the area to attend our rich sporting events."

Id.

32. There is no evidence of application by the Club or by DNR or by any agent of either, for any county permits or authorizations before or after the Club's 1996 pre-application conference request, other than a pre-application meeting request submitted by the Club in 2005 (discussed below) and a County building permit for construction of an ADA ramp serving the rifle line shelter in 2008 or 2009.

33. From approximately 1996 forward, the Club undertook a process of developing portions of its claimed "historic eight acres", clearing, grading and sometimes excavating wooded or semi-wooded areas to create "shooting bays" bounded on at least three sides by earthen berms and backstops. Aerial photography allowed the Court to see snapshots of the expansion of shooting areas defined by earthen berms and backstops and verify testimony of the time line of development: 2001 imagery (Exhibits 9 and 16A) depicts the range as consisting of the pistol and rifle ranges, and shooting bays at the locations of present-day Bays 1, 2, 3, 9, 10 and 11. Comparing the 2001 imagery with March 2005 imagery (Exhibit 10), no new shooting bays were established during that interval. "Birds Eye" aerial imagery from the MS Bing website from an unspecified date later in 2005 provided the clearest evidence of the state of development at the Property (Exhibits 462, 544, 545, 546, 547), which included clearing and grading work performed in the eastern portion of the Property after the March 2005 imagery. (See discussion below under the subject of the proposed 300 meter range). June 2006 and

August 2006 imagery (Exhibits 11 and 12) reveals clearing and grading to create a new shooting bay at the location of present-day Bay 7. February 2007 imagery (Exhibit 13) reveals clearing and grading work to create new shooting bays at the locations of present-day Bay 8 and present-day Bay 6, and reveals clearing to the west of Bays 7 and 8 to accommodate a storage unit or trailer at that location. February 2007 imagery also reveals that the Club extended a berm along the north side of the rifle range and extended the length of the rifle range by clearing, grading and excavating into the hillside to the northeast of that range. April 2009 imagery (Exhibit 14) reveals establishment of a new shooting bay, Bay 4, and enlargement of Bay 7. May 2010 imagery (Exhibit 15) reveals establishment of a new shooting bay, Bay 5, enlargement of Bay 6, and additional clearing to the west of Bays 8 and 7 up to the edge of a seasonal pond (the easternmost of two ponds delineated as wetlands on club property, discussed below).

34. Bay 6, Bay 7 and the northeast end of the rifle range are each cut into hillsides, creating "cut slopes" each in excess of five feet in height and a slope ratio of three to one. The excavation work performed to create Bay 6 and Bay 7 and to extend the rifle range to the northeast required excavation significantly in excess of 150 cubic yards of material at each location. The excavation work into the hillside for Bay 7 took place in phases after 2005 and before April 2009. The excavation work into the hillside for Bay 6 took place in phases between August 2006 and May 2010, and the excavation work at Bay 6 between April 2009 and May 2010 required excavation in excess of 150 cubic yards of material. The excavation work into the hillside at the northeast end of the rifle range took place between August 2006 and February 2007.

35. One of the earthen berms constructed after February 2007 is a continuous berm that separates Bay 4 and Bay 5 and other developed areas on the Property from the Property's undeveloped areas to the north and west. Starting at the northeast corner of Bay 3, this berm runs to the east to define the northern edge of Bay 4, then turns northeast and curves around a cleared area used for storage around the Property's well house, and then turns north to form the western and northern edges of Bay 5. This berm was constructed in phases after February 2007, and the part of this berm forming the western and northern edges of Bay 5 was constructed between April 2009 and May 2010. This latter phase of the berm's construction between April 2009 and May 2010 required movement of more than 150 cubic yards of material. This berm also is more than five feet in height and has a slope ratio of greater than three to one.

36. For each hillside into which there was excavation and creation of cut slopes at the Property, there were no applications for County permits or authorizations, and no erosion or slope maintenance plans were submitted to or reviewed by the County. For each location on the Property where clearing, grading, and/or excavation occurred, there were no applications made for County permits such as grading permits or site development activity permits.

37. Over the years, the Club used native materials from the Property to form berms and backstops for shooting areas, usually consisting of the spoils from excavating into hillsides on the Property.

38. There is no fence around the active shooting areas of the Property to keep out or discourage unauthorized range users.

SITE DEVELOPMENT AT THE PROPERTY - 300 METER RANGE

39. In approximately 2003, KRRC began the process of applying to the State of Washington Interagency Committee for Outdoor Recreation ("IAC") for a grant to be used for

improving the range facilities. KRRC identified the project as a "range reorientation" project to build a rifle range that did not have its "back" to the Seabeck Highway.

40. In March of 2005, DCD received complaints that KRRC was conducting large scale earthwork activities and that the noise from shooting activities from the range had substantially increased. The area in which earth-moving activities took place is a large rectangular area in the eastern portion of the Property, with a north-south orientation. This area would become known as the proposed "300 meter range", and it is clearly visible in each aerial image post-dating March 2005. In March of 2005, DCD staff visited the 300 meter range area and observed "brushing" or vegetation clearing that appeared to be exploratory in nature.

41. In April of 2005, DCD staff visited the 300 meter range and discovered recent earthwork including grading, trenching, surface water diversion, and vegetation removal including logging of trees that had been replanted after DNR's 1991 timber harvest. The entire area of the cleared 300 meter range was at least 2.85 acres and the volume of excavated and graded soil was greater than 150 cubic yards.

42. DCD staff issued an oral "stop work" directive to the Club, with which the Club complied. DCD recommended to the Club that it request a pre-application meeting to discuss various permits and authorizations that would be required in order to proceed with the project.

43. KRRC submitted a "pre-application meeting request" to DCD on May 12, 2005 along with a cover letter from the Club president and conceptual drawings of the proposed project (Exhibits 138 and 272). The letter stated that the range re-alignment project was "not an expansion of the current facilities."

44. On June 21, 2005, KRRC officers met with DCD staff, including DCD representing disciplines of code enforcement, land use and planning, site development and

critical areas. County staff informed KRRC that the Club needed to apply for a Conditional Use Permit ("CUP") per Kitsap County Code Title 17 because the site work in the 300 meter range area constituted a change in or expansion of the Club's land uses of the property. County staff also informed the Club that it would need to apply for other permits for its work, including a site development activity permit per Kitsap County Code Title 12. County staff identified several areas of concern, which were memorialized in a follow-up letter from the County to the Club dated August 18, 2005 (Exhibit 140).

45. Later in 2005 and in the first half of 2006, the Club asked the County to reconsider its stance that the Club was required to apply for a CUP in order to continue operating a shooting range on the Property. The County did not change its position. Nor did the County issue a notice of code violation or a notice informing the Club that it had made an administrative determination pursuant to the County's nonconforming use ordinance, KCC Chapter 17.460.

46. In the summer of 2006, KRRC abandoned its plans to develop the 300 meter range and re-directed its efforts and the grant money toward improvements of infrastructure in its existing range.

47. DCD staff persons visited the Property on at least three occasions during 2005, and on at least one occasion walked through the developed shooting areas en route to and from the 300 meter range area.

48. In approximately 2007, the Club replanted the 300 meter range with several hundred Douglas fir trees, and believed that by so doing it was satisfying the requirements of the landowner, DNR. The Club did not develop any formal plan for the replanting and care of the new trees. All of the new trees died, and today the 300 meter range continues to be devoid of any trees.

49. The 300 meter range has been and continues to be used for storage of target stands, barrels, props and building materials, as confirmed by photographs taken during the County's January 2011 discovery site visits to the Property and by Marcus Carter's (Executive Officer of KRRC and Club Representative at trial) testimony.

50. KRRC asserts the position that by abandoning its plans to develop the 300 meter range, it has retreated to its eight acre area of claimed "historic use" and has not established a new use that would potentially terminate the Club's claimed nonconforming use status.

51. KRRC never applied for a conditional use permit for its use of the property as a shooting range or private recreational facility, and has never applied for a site development activity permit for the 300 meter range work or for any of the earth-disturbing work conducted on the Property.

SITE DEVELOPMENT AT THE PROPERTY - TIGHTLINING WATERCOURSE ACROSS THE RANGE

52. The Seabeck Highway has been in its present location for several decades. The Seabeck Highway is a county road served by storm water features including culverts and roadside ditches. Two culverts under the Seabeck Highway were identified as particularly relevant to the litigation. First, a 42-inch diameter culvert to the east of the Club's gated entrance onto the Seabeck Highway flows from south-to-north and onto the Property ("42-inch culvert"). Second, a 24-inch diameter culvert to the west of the Club's parking lot typically flows from north-to-south, away from the Property ("24-inch culvert"). Storm and surface water flows through the 42-inch culvert during the rainy seasons.

53. Prior to the late summer of 2006, water discharged from the 42-inch culvert followed a channel leading away from the Seabeck Highway and into a stand of trees south of

the rifle range. The channel reached the edge of a cleared area to the south of the rifle range and the drainage continued across the rifle range in a northerly direction, primarily in the open and low areas (or depressions) and through and between three and five culverts of not greater than 20 feet in length. There was conflicting testimony about what the drainage did as it approached the wetland areas to the north of the rifle range. The Club's wetland expert Jeremy Downs opined that the water was absorbed into the gravelly soil present between the rifle range and the wetland areas to the north, while the County's wetland expert Bill Shiels opined that the water would be of sufficient quantity during times of peak rain fall that it would have to travel in a channel or channels as it neared the wetlands.

54. In the late summer and early fall of 2006, the Club replaced this water course with a pair of 475-foot long 24-inch diameter culverts. These "twin culverts" crossed the entire developed area of the range, from their inlets in the stand of trees by the Seabeck Highway to their outlets north of the developed areas of the range. To achieve this result, the Club used heavy earth-moving equipment to remove existing culverts and to excavate a trench the entire length of the new culverts, installed the culverts, covered up the trench with fill, then brought in additional fill from elsewhere on the Property to raise the level of the formerly depressed areas in the rifle range. Excavation and re-grading for this project required movement of far more than 150 cubic yards of soil.

55. After the Club "undergrounded" the water course into the 475-foot long culverts but prior to February 2007, the Club extended the earthen berm along the north side of its rifle range and over the top of the newly-buried culverts, nearly doubling the berm's length. Extending this berm involved excavating and re-grading soil far in excess of 150 cubic yards.

56. KRRC never applied to the County for review or approval of the cross-range culvert project, or the berm construction that followed. KRRC never developed engineering plans for this project or undertook a study to determine whether the new culverts have capacity to handle the water from the 42-inch culvert or to determine whether the outlet of the culverts is properly engineered to minimize impacts caused by the direct introduction of the culvert's storm and surface water into a wetland system. KRRC offered evidence that during July 2011 it consulted with agents of the state Department of Ecology (DOE), the Army Corps of Engineers, the state Department of Fish and Wildlife and the Suquamish Tribe with regard to its activities proximate to wetlands, but the record contains no evidence that any of these agencies evaluated subjects within the County's jurisdiction such as critical areas including wetland buffers, or assessed the capacity of the cross-range culverts.

57. Prior to the discovery site visits by County staff and agents in January 2011, the County was unaware of the cross-range culverts.

WETLAND STUDY, DELINEATIONS AND PROTECTED BUFFERS

58. The parties each commissioned preliminary delineations of suspected wetland and stream features on the Property. Wetland delineations are ordinarily conducted prior to site development activities which may affect a suspected wetland, and are ordinarily submitted to the regulating authorities (e.g. counties and DOE) for review and comment. In this instance, there was no application for a permit or authorization.

59. The County's wetland consulting firm, Talasaea Consulting, and the Club's consulting firm, Soundview Consultants, each studied wetlands to the north and west of developed areas of the Property, as well as the drainage crossing the range originating from the 42-inch culvert, and suspected wetlands in the 300 meter range. For purposes of these findings,

the Court adopts the County's suggestion to limit its findings to areas of the Property about which there are undisputedly wetlands. The Court makes no finding as to whether the County has proven that wetlands currently exist in the 300 meter range area and makes no finding as to whether the County has proven that the water course from the 42-inch culvert ever followed a channel which is capable of hosting salmonid species, prior to entering the Property's wetlands. Therefore, the Court confines its remaining analysis of the Property's wetlands and streams and their associated habitats and buffers, to the wetlands to the north and west of the developed portions of the range ("wetlands").

60. The Property's wetlands are connected to and part of a larger wetland system in the DNR parcels to the north of the Property. Ecologically, this wetland system is of high value because it is part of the headwaters of the Wildcat Creek / Chico Creek watershed, which supports migrating salmon species. The wetlands on the Property are directly connected to a tributary of Wildcat Creek, and are waters of the State of Washington, both as a finding of fact and a conclusion of law.

61. The Court heard testimony of and received the reports and maps by the parties' respective wetland expert witnesses. The County's expert, Bill Shiels of Talasaea Consultants, determined that the Property's wetlands constitute a single wetland denoted as Wetland A, and concluded that this wetland is a "category I" wetland, for which the Kitsap County Code provides a 200-foot buffer area. The Club's expert, Jeremy Downs of Soundview Consulting, determined that the wetlands on the Property constitute two separate wetlands denoted as Wetlands A and B, and concluded that each wetland is a "category II" wetland, for which the Kitsap County Code provides a 100-foot buffer area. Both experts determined that an additional 50 feet should be added to the buffer to reflect high intensity of adjacent uses, i.e. the KRRC

shooting ranges. Therefore, the County's expert and the Club's expert concluded that 250-foot and 150-foot buffers apply to the Property's wetlands, respectively. For purposes of these findings of fact, the Court will accept the Soundview conclusion that there are two protected wetlands on the Property (A and B) and that a 150-foot buffer applies to those wetlands. For purposes of these findings, the Court will further accept Soundview's delineation and mapping of the wetlands B which is nearest the active shooting portions of the Property.

62. To install its cross-range culverts in 2006, the Club excavated and re-graded fill in the wetland buffer within 150 feet of Wetland B. This project involved excavation and grading far in excess of 150 cubic yards of material.

63. The cross-range culverts now discharge storm water and surface water directly into Wetland B, replacing the former system which ordinarily absorbed storm water and surface water into the soil and more gradually released it into the wetlands on the Property.

64. To construct the berm that starts at the northeastern corner of Bay 3 and travels east along the edge of Bay 4, then travels northeast along the storage / well house area, and then travels north along the edge of Bay 5, the Club placed fill in the wetland buffer within 150 feet of Wetland B. This project also involved excavation and grading in excess of 150 cubic yards of material.

65. At least five locations at the property have slopes higher than five feet in height with a slope ratio of greater than three to one: (1) a cut slope at the end of the rifle range; (2) berms at Bays 4 and 5 and the berm between these bays; (3) cut slope at Bay 6; (4) cut slope at Bay 7; and (5) the extension of the rifle range berm. Each of these earth-moving projects took place after 2005, and the Club did not apply for permits or authorizations from Kitsap County.

66. Prior to this litigation, KRRC never obtained a wetland delineation for the Property or otherwise determined potential wetland impacts for any site development projects proposed for the Property.

RANGE SAFETY

67. The parties presented several experts who opined on issues of range safety. The Property is a "blue sky" range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. The Court accepts as persuasive the SDZ diagrams developed by Gary Koon in conjunction with the Joint Base Lewis-McChord range safety staff, as representative of firearms used at the range and vulnerabilities of the neighboring residential properties. The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.

68. The County produced evidence that bullets left the range based on bullets lodged in trees above berms. The Court considered the expert opinions of Roy Ruel, Gary Koon, and Kathy Geil and finds that more likely than not, bullets escaped from the Property's shooting areas and that more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future.

69. The Court finds that KRRC's range facilities are inadequate to contain bullets to the Property, notwithstanding existing safety protocols and enforcement.

ACTION OR PRACTICAL SHOOTING

70. The Property is frequently used for regularly scheduled practical shooting practices and competitions, which use the shooting bays for rapid-fire shooting in multiple directions. Loud rapid-fire shooting often begins as early as 7 a.m. and can last as late as 10 p.m.

COMMERCIAL AND MILITARY USES OF THE PROPERTY

71. KRRC and the military shared use of the adjacent federal Camp Wesley-Harris property's shooting range facilities until sometime shortly after World War II.

72. During the early 1990's, U.S. Naval personnel are said to have conducted firearm qualification exercises at the Property on at least one occasion.

73. Sharon Carter is the owner of a sole proprietorship established as a business in Washington in the late 1980's. In approximately 2002, this sole proprietorship registered a new trade name, the "National Firearms Institute" ("NFI") and registered the NFI at the Property's address of 4900 Seabeck Highway NW., Bremerton, WA. Since 2002, the NFI provided a variety of firearms and self-defense courses, mostly taught at the Property by Ms. Carter's husband, Marcus Carter. The NFI kept its own books and had its own checking account, apart from the Club. Mr. Carter is the long-time Executive Officer of KRRC, and NFI's other primary instructor is Travis Foreman, who is KRRC's Vice-President and the Carters' son-in-law.

74. In approximately 2003, a for-profit business called Surgical Shooters, Inc. ("SSI"), began conducting official small arms training exercises at the Property's pistol range for active duty members of the United States Navy, primarily service members affiliated with the submarines based at the Bangor submarine base. For approximately one year, SSI conducted this training at the Property on a regular basis. SSI held a contract with the Navy to provide this training, and SSI had an oral arrangement with NFI. On a per-day basis, SSI paid NFI a fee for the use of the Property, one-half of which would then be remitted to the Club itself. NFI coordinated the SSI visits to the Property and made sure that a KRRC Range Safety Officer was present during each SSI training session at the Property.

75. In approximately 2004, SSI ceased providing training at the Property and was replaced by a different business, Firearms Academy of Hawaii, Inc. ("FAH"). From approximately 2004 until Spring 2010, FAH regularly provided small arms training at the Property to active duty U.S. Navy personnel, under an oral arrangement with NFI. Again, on a per-day basis, FAH paid NFI a fee for the use of the Property, one-half of which would then be remitted to the Club itself. NFI coordinated the FAH visits to the Property and made sure that a KRRC Range Safety Officer was present during each FAH training session at the Property. FAH training at the Property consisted of small weapons training of approximately 20 service members at a time. Each FAH training course took place over three consecutive weekdays at the Property's pistol range, as often as three weeks per month. At the conclusion of this arrangement, FAH paid $500 to NFI for each day of KRRC range use, half of which the NFI remitted to the KRRC.

76. The SSI and FAH training took place on the Property's pistol range. During FAH's tenure at the Property, U.S. Navy personnel inspected the pistol range and determined that it was acceptable for purposes of the training.

77. Prior to the SSI and FAH training, there is no evidence of for-profit firearm training at the Property, and these businesses did not apply for approvals or permits with Kitsap County to authorize their commercial use of the Property.

78. In November 2009, U.S. Navy active duty personnel were present on the property on at least one occasion for firearms exercises not sponsored or hosted by the FAH. On one such occasion, a military "Humvee" vehicle was parked in the rifle range next to the rifle range's shelter. A fully automatic, belt-fed rifle (machine gun) was mounted on top of this Humvee, and the machine gun was fired in small bursts, down range.

79. Official U.S. Navy training at the Property ceased in the Spring of 2010.

NOISE GENERATED FROM THE PROPERTY AND HOURS OF OPERATION

80. The Club allows shooting between 7 a.m. and 10 p.m., seven days a week. Shooting sounds from the Property are commonly heard as early as 7 a.m. and as late as 10 p.m. In the early 1990's, shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer.

81. Shooting sounds from the Property have changed from occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration. Rapid fire shooting sounds from the Property have become common, and the rapid-firing often goes on for hours at a time.

82. Use of fully automatic weapons at KRRC now occurs with some regularity.

83. Rapid-fired shooting, use of automatic weapons, and use of cannons at the Property occurred infrequently in the early 1990's.

84. The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the Property. The noise conditions described by these witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" and the Court accepts this description as persuasive.

85. Expanded hours, commercial use of the club, allowing use of explosive devices (including Tannerite), higher caliber weaponry and practical shooting competitions affect the neighborhood and surrounding environment by an increase in the noise level emanating from the Club in the past five to six years.

EXPLOSIVES AND EXPLODING TARGETS

86. The Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud "booming" sounds in residential neighborhoods within two miles of the Property, and cause houses to shake.

87. Use of cannons or explosives was not common at the Club in approximately 1993.

AMENDMENT OF KITSAP COUNTY CODE CHAPTER 17.460

88. On May 23, 2011, the Kitsap County Board of County Commissioners adopted ordinance 470-2011 in a regularly scheduled meeting of this Board, amending the Kitsap County Zoning Ordinance's treatment of nonconforming land uses at Chapter 17.460.

89. Notice of the May 23, 2011 meeting was published in the Kitsap Sun, which is the publication used in Kitsap County for public notices of BOCC meeting agenda items.

90. There is no evidence in the record supporting the contention that this amendment was developed to target KRRC or any of the County's gun ranges.

BASED UPON the foregoing FINDINGS OF FACT, the Court hereby makes the following

II. CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over the real property, the named Defendant, and the Parties' claims and counterclaims in this action, and venue is proper.

2. The Kitsap County Department of Community Development is the agency charged with regulating land use, zoning, building and site development in unincorporated Kitsap County and enforcing the Kitsap County Code.

3. The conditions of (1) ongoing noise caused by shooting activities, and (2) use of explosives at the Property, and (3) the Property's ongoing operation without adequate physical facilities to confine bullets to the Property each constitute a public nuisance.

4. Defendant Kitsap Rifle and Revolver Club is the owner and occupant of the real property, and these orders shall also bind successor owners or occupants of the Property, if any.

5. Non-conforming uses are uniformly disfavored, as they limit the effectiveness of land use controls, imperil the success of community plans, and injure property values. Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1, 8 (1998).

> Although found to be detrimental to important public interests, non-conforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. *[cite omitted]*. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right **1028 to significantly change, alter, extend, or enlarge the existing use.

Id.

6. KRRC enjoyed a legal protected nonconforming status for historic use of the existing eight acre range.

7. KRRC was not granted the right to significantly change, alter, extend or enlarge the existing use, by virtue of the 2009 deed from Kitsap County.

8. The actions by KRRC of:

(1) expanded hours;

(2) commercial, for-profit use (including military training);

(3) increasing the noise levels by allowing explosive devises, higher caliber weaponry greater than 30 caliber and practical shooting

significantly changed, altered, extended and enlarged the existing use.

9. Such actions noted above under Conclusion of Law #8 were "expansion" of use and were not "intensification" as argued by KRRC.

10. Intensification was clarified by the Washington Supreme Court in Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). The Court stated that intensification is permissible ". . . where the nature and character of the use is unchanged and substantially the same facilities are used." Id. As noted above, the nature of the use of the property by KRRC changed, expanded and intensified from 1993 through 2009.

11. Defendant has engaged in and continues to engage in creating and/or maintaining a public nuisance by the activities described herein. The activities are described by statute and code to be public nuisances. These acts constitute public nuisances as defined by both RCW 7.48.120 and KCC 17.530.030 and 17.110.515. The activities described above annoy, injure, and/or endanger the safety, health, comfort, or repose of others. Furthermore, Kitsap County Code authorizes this action "for a mandatory injunction to abate the nuisance in accordance with the law" for any use, building or structure in violation of Kitsap County Code Title 17 (land use). KCC 17.530.030. Kitsap County Code provides that "in all zones . . . no use shall produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses." KCC 17.455.110.

12. No lapse of time can legalize a public nuisance. RCW 7.48.190.

13. The continued existence of public nuisance conditions on the subject Property has caused and continues to cause the County and the public actual and substantial harm.

14. Kitsap County has clear legal and equitable authority to protect the health, safety, and welfare of the public against public nuisances.

15. Article XI, Section 11 of the Washington State Constitution authorizes counties to make and enforce "local police, sanitary and other regulations."

16. RCW 36.32.120 (10) authorizes Kitsap County to declare and abate nuisances as follows:

> The legislative authorities of the several counties shall: ....(10) Have power to declare by ordinance what shall be deemed a nuisance within the county, including but not limited to "litter" and "potentially dangerous litter" as defined in RCW 70.93.030; to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance; and to levy a special assessment on the land or premises on which the nuisance is situated to defray the cost, or to reimburse the county for the cost of abating it. This assessment shall constitute a lien against the property which shall be of equal rank with state, county, and municipal taxes.

17. The state statutes dealing with nuisances are found generally at Chapter 7.48 RCW. Injunctive relief is authorized by RCW 7.48.020. RCW 7.48.200 provides that "the remedies against a public nuisance are: Indictment or information, a civil action, or abatement." RCW 7.48.220 provides "a public nuisance may be abated by any public body or officer authorized thereto by law." RCW 7.48.250; 260 and 280 provide for a warrant of abatement and allow for judgment for abatement costs at the expense of the Defendant.

18. Kitsap County has no plain, adequate, or speedy remedy at law to cure this nuisance, and the neighbors and public-at-large will suffer substantial and irreparable harm unless the nuisance conditions are abated and all necessary permits are obtained in order for the Defendant's shooting operations to continue or to resume after imposition of an injunction.

19. The Property and the activities described on the Property herein constitute a public nuisance per se, because the Defendant engaged in new or changed uses, none of which

are authorized pursuant to Kitsap County Code Chapter 17.381 or authorized without issuance of a conditional use permit.

20. The Property and the above-described activities on the Property constitute a statutory public nuisance. The Property has become and remains a place violating the comfort, repose, health and safety of the entire community or neighborhood, contrary to RCW 7.48.010, 7.48.120, 7.48.130, and 7.48.140 (1) and (2), and, therefore, is a statutory public nuisance. Defendant has engaged in and continues to engage in public nuisance violations by the activities described herein. The activities are described by statute and code to be public nuisances as defined by both RCW 7.48.120 The activities described above annoy, injure, and/or endanger the safety, health, comfort, or repose of others.

21. The failure of the Defendant to place reasonable restrictions on the hours of operation, caliber of weapons allowed to be used, the use of exploding targets and cannons, the hours and frequency with which "practical shooting" practices and competitions are held and the use of automatic weapons, as well as the failure of the Defendant to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property, is each an unlawful and abatable common law nuisance.

22. To invoke the Uniform Declaratory Judgments Act, chapter 7.24 RCW, a plaintiff must establish: "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial

determination of which will be final and conclusive. Coppernoll v. Reed, 155 Wn.2d 290, 300, 119 P.3d 318 (2005); citing To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), and Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

23. As applied to the relief sought by the County in this action, an actual, present, and existing dispute is presented for determination by the Court, based upon the County's claim that any non-conforming land use status for use of the Property as a shooting range has been voided by the substantial changes in use of the Property and unpermitted development of facilities thereupon.

24. The subject property is zoned "rural wooded", established in KCC Chapter 17.301. KCC 17.301.010 provides in part that this zoning designation is intended to encourage the preservation of forest uses, retain an area's rural character and conserve the natural resources while providing for some rural residential use, and to discourage activities and facilities that can be considered detrimental to the maintenance of timber production. With this stated purpose, the zoning tables are applied to determine if any uses made of the property are allowed.

25. KCC Chapter 17.381 governs allowed land uses, and KCC 17.381.010 identifies categories of uses: A given land use is either Permitted, Permitted upon granting of an administrative conditional use permit, Permitted upon granting of a hearing examiner conditional use permit, or Prohibited. Where a specific use is not called out in the applicable zoning table, the general rule is that the use is disallowed. KCC 17.381.030. The zoning table for the rural wooded zone, found at KCC 17.381.040(Table E), provides and the Court makes conclusions as the following uses:

a. Commercial / Business Uses – With exceptions not relevant here, all commercial uses are prohibited in rural wooded zone. None of the activities occurring at the subject property

appear to be listed as commercial/business uses identified in the table. The Court concludes that the Property has been used for commercial and/or business uses for-profit entities including the National Firearms Institute, Surgical Shooters Inc. and the Firearms Academy of Hawaii, starting in approximately 2002. Furthermore, "training" generally or "tactical weapons training" specifically are uses not listed in the zoning table for the rural wooded zone.

b. Recreational / Cultural Uses – the Club is best described as a private recreational facility, which is a use listed in this section of KCC 17.381.040 (Table E) for rural wooded. KCC 17.110.647 defines "recreational facility" as "a place designed and equipped for the conduct of sports and leisure-time activities. Examples include athletic fields, batting cages, amusement parks, picnic areas, campgrounds, swimming pools, driving ranges, skating rinks and similar uses. Public recreational facilities are those owned by a government entity." No other uses identified in the recreational/cultural uses section of the rural wooded zoning table are comparable.

The Court concludes that a private recreational facility does not include uses by a shooting range to host official training of law enforcement officers or military personnel, and that these uses are new or changed uses of the Property. The Court concludes that a private recreational facility use does not encompass the use of automatic weapons, use of rifles of calibers greater than common hunting rifles, or of professional level competitions.

26. The Court finds that the land uses identified here, other than use as a private recreational facility, are expansions of or changes to the nonconforming use at the Property as a shooting range under KCC Chapter 17.460 and Washington's common law regarding nonconforming land use. By operation of law, the nonconforming use of the Property is terminated.

27. The Club's unpermitted site development activities at the 300 meter range (2005) constituted an expansion of its use of the property in violation of KCC 17.455.060 because the use of the Property as a private recreational facility in the rural wooded zone requires a conditional use permit per KCC Chapter 17.381. Furthermore, the Club's failure to obtain site development activity permitting for grading and excavating each in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

28. The Club's unpermitted installation in 2006 of the twin 24-inch culverts which cross the range and empty into the wetland constituted an expansion and change of its use of the Property, and the Club's failure to obtain SDAP permitting for its excavation, grading and filling work in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

29. The Club's earth moving activities within the 150-foot buffer for Wetland B violated KCC 19.200.215.A.1, which requires a wetland delineation report, a wetland mitigation report and erosion and sedimentation control measures and/or a Title 12 site development activity permit for any new development. The Court concludes that these illegal uses terminate the nonconforming use of the Property as a shooting range.

30. The Club's unpermitted construction of earthen berms starting at Bay 4 and proceeding to the north adjacent to the wetland, constituted an expansion and change of its use of the Property, and the Club's failure to obtain SDAP permitting for excavation, grading and filling work in excess of 150 cubic yards of soil and for its construction of berms with slopes greater than five feet in height with a steepness ratio of greater than three to one (KCC

12.10.030(4)) as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

31. The Club's unpermitted cutting into the hillsides at Bays 6 and 7 and at the end of the rifle range, excavating in excess of 150 cubic yards of soil at each location and creating cut slopes far greater than five feet in height with a steepness ratio of greater than three to one as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range. The Court further concludes, based on the timing of maintenance work at each cut slope location post-dating the June 2009 deeding of the Property from the County to the Club, that SDAP permitting was required for work conducted after June 2009. These illegal uses of the land terminate the nonconforming use of the Property as a shooting range.

32. The nuisance conditions at the range further constitute illegal uses of the land, which terminate the nonconforming use of the Property as a shooting range. The Club's expansion of days and hours in which shooting, generally, and rapid-fire shooting in particular, takes place on a routine basis, and the advent of regularly scheduled practical shooting practices and competitions constitute a change in use that defies and exceeds the case law's definition or understanding of "intensification" in the area of nonconforming use. These changes act to terminate the nonconforming use of the Property as a shooting range.

33. The Club's conversion from a small-scale lightly used target shooting range in 1993 to a heavily used range with an enlarged rifle range and a 11-bay center for local and regional practical shooting competitions further constitutes a dramatic change in intensity of use (and of sound created thereby), thereby terminating the nonconforming use of the Property as a shooting range.

34. By operation of KCC Chapter 17.381, the KRRC or its successor owner or occupier of the Property must obtain a conditional use permit before resuming any use of the Property as a shooting range or private recreational facility.

35. KRRC has not proven that Ordinance 470-2011, amending KCC 17.460, is unconstitutional or suffered from any defect in service or notice. This Ordinance did not amend or alter the effect of KCC 17.455.060 (existing uses) which remains in full force and effect. KCC 17.455.060 provides that uses existing as of the adoption of Title 17 (Zoning) may be continued, but also prohibits their enlargement or expansion, unless approved by the hearing examiner pursuant to the Administrative Conditional Use Permit procedure of Title 17.420. Washington case law, as in Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998), also holds that uses that lawfully existed before the enactment of zoning ordinances may continue, but the existing use may not be significantly changed, altered, extended, or enlarged.

36. The 2009 Bargain and Sale Deed cannot be read as more than a contract transferring the Property from the County to the KRRC, with restrictive covenants binding only upon the Grantee KRRC. Paragraph 3 stands as an acknowledgement of eight geographic acres of land that were used for shooting range purposes. The language in the 2009 Bargain and Sale Deed does not prohibit Kitsap County from enforcing its ordinances or otherwise acting pursuant to the police powers and other authorities granted to it in Washington's Constitution and in the Revised Code of Washington.

37. The Court furthermore concludes that the Washington Open Public Meetings Act, chapter 42.30 RCW, limits the effect of the enacting resolution and accompanying proceedings to the property transfer itself. Absent specific agreement voted upon by the governing body

during a public meeting, the 2009 Deed cannot be interpreted as a settlement of potential disputes between the parties.

BASED UPON THE FOREGOING FINDINGS OF FACT and CONCLUSIONS OF LAW the Court hereby enters the following ORDERS:

III. ORDERS

IT HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Kitsap County's requests for affirmative relief shall be granted as follows:

DECLARATORY JUDGMENT

1. Kitsap County's Motion pursuant to chapter 7.24 RCW for judgment declaring that the activities and expansion of uses at the Property has terminated the legal nonconforming use status of the Property as a shooting range by operation of KCC Chapter 17.460 and by operation of Washington common law regarding nonconforming uses, is hereby GRANTED.

2. The Property may not be used as a shooting range until such time as a County conditional use permit is issued to authorize resumption of use of the Property as a private recreational facility or other recognized use pursuant to KCC Chapter 17.381.

JUDGMENT

3. Defendant is in violation of Chapter 7.48 RCW and Chapter 17.530 Kitsap County Code;

4. The conditions on the Property and the violations committed by the Defendant constitute statutory and common law public nuisances; and

5. Representatives of the Kitsap County Department of Community Development are hereby authorized to inspect and continue monitoring the Property before, during and after any abatement action has commenced; and

INJUNCTION (EFFECTIVE IMMEDIATELY UNLESS NOTED TO CONTRARY)

6. A permanent, mandatory and prohibitive injunction is hereby issued enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by application for and issuance of a conditional use permit for use of the Property as a private recreational facility or other use authorized under KCC Chapter 17.381. The County may condition issuance of this permit upon successful application for all after-the-fact permits required pursuant to Kitsap County Code Titles 12 and 19.

7. A permanent, mandatory and prohibitive injunction is hereby issued further enjoining the following uses of the Property, which shall be effective immediately:

a. Use of fully automatic firearms, including but not limited to machine guns;

b. Use of rifles of greater than nominal .30 caliber;

c. Use of exploding targets and cannons; and

d. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening.

WARRANT OF ABATEMENT

8. The Court hereby authorizes issuance of a WARRANT OF ABATEMENT, pursuant to RCW 7.48.260, the detail of which shall be determined by the Court at a later hearing before the undersigned.

9. The costs of abatement shall abide further order of the Court.

10. This Court retains jurisdiction to enforce this order by all lawful means including imposition of contempt sanctions and fines.

COSTS AND FEES

11. Pursuant to KCC 17.530.030, Defendant Kitsap Rifle and Revolver Club shall pay the costs of the County to prosecute this lawsuit, in an amount to be determined by later order of the Court.

DATED this 9 day of February, 2012.

JUDGE SUSAN K. SERKO

FILED
DEPT. 14
IN OPEN COURT
FEB 09 2012
Pierce County Clerk
By..... DEPUTY

KITSAP COUNTY, a political subdivision of the State of Washington, Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and John Does and Jane Does I–XX, inclusive, Appellants.

In the Matter of the Nuisance and Unpermitted Conditions Located at One 72–acre parcel identified by Kitsap County Tax Parcel ID No. 362501–4–002–1006 with street address 4900 Seabeck Highway NW, Bremerton, Washington, Defendant.

Nos. 43076–2–II, 43243–9–II.

Court of Appeals of Washington, Division 2.

Oct. 28, 2014.

Background: County brought action against gun club for an injunction, declaratory judgment, and nuisance abatement, alleging club impermissibly expanded nonconforming use of property as a shooting range. The Superior Court, Pierce County, Susan K. Serko, J., issued permanent injunction prohibiting use of property as a shooting range until issuance of a conditional use permit and prohibiting use of fully automatic firearms, exploding targets and cannons, and use as an outdoor shooting range before 9:00 a.m. or after 7:00 p.m. Club appealed.

Holdings: The Court of Appeals, Maxa, J., held that:

(1) zoning code provision that allowed continuation of a nonconforming use for property allowed for the intensification of the nonconforming use but not for an expansion of such use;

(2) increase in hours at range represented an intensification of the nonconforming use rather than an impermissible expansion;

(3) commercial and military use of the shooting range constituted an impermissible expansion of the gun club's nonconforming use;

(4) increased noise levels constituted an impermissible expansion of nonconforming use;

(5) noise from range constituted a public nuisance;

(6) operation of range without proper safety measures constituted public nuisance;

(7) deed provisions did not preclude enforcement of county development regulations for improvements on property;

(8) county was not equitably estopped from bringing nuisance action against gun club;

(9) county code did not provide for a termination of nonconforming use to remedy code violations or unlawful expansion of nonconforming use; and

(10) trial court did not abuse its discretion in issuing permanent injunction restricting use of certain firearms at range and limiting gun club's operating hours.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Zoning and Planning ⇦1300

A "legal nonconforming use" is a use that lawfully existed before a change in regulation and is allowed to continue although it does not comply with the current regulations.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇦4092

Zoning and Planning ⇦1300

Nonconforming uses are allowed to continue because it would be unfair, and perhaps a violation of due process, to require an immediate cessation of such a use. U.S.C.A. Const.Amend. 14.

3. Zoning and Planning ⇦1306, 1309

Although a property owner generally has a right to continue a protected nonconforming use, there is no right to significantly change, alter, extend, or enlarge the existing use.

4. Zoning and Planning ⇦1310, 1311

Under Washington common law, nonconforming uses may be intensified, but not expanded.

5. Zoning and Planning ⇦1300

Local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution.

6. Zoning and Planning ⇦1311

County zoning code provision that allowed continuation of a nonconforming use for property allowed for the intensification of the nonconforming use but not for an expansion of such use.

7. Zoning and Planning ⇦1203

Zoning ordinances in derogation of the common law should be strictly construed.

8. Zoning and Planning ⇦1311

Determination of whether an expansion or an intensification of a nonconforming use has occurred is a question of law.

9. Zoning and Planning ⇦1311

Increased hours of shooting range activities on property did not effect a fundamental change in the use and did not involve a use different in kind than the nonconforming use, and thus, the increase in hours represented an intensification of the nonconforming use rather than an impermissible expansion.

10. Zoning and Planning ⇦1311

The commercial and military use of the shooting range constituted an impermissible expansion of the gun club's nonconforming use to use property as shooting range; using the property to operate a commercial business primarily serving military personnel represented a fundamental change in use and was completely different in kind than using the property as a shooting range for club members and the general public.

11. Zoning and Planning ⇦1311

Frequent and drastically increased noise levels found to exist at shooting range property constituted a fundamental change in the use of the property that represented an impermissible expansion of nonconforming use; rapid-fire shooting, use of automatic weapons, and the use of cannons and explosives at the property occurred infrequently at the time county considered use of property for shooting range to be a lawfully established nonconforming use.

12. Zoning and Planning ⇦1370

Gun club's unpermitted development work on shooting range property constituted unlawful use; club violated various county code provisions by failing to obtain site development activity permits for extensive property development work, including grading, excavating, and filling, and failing to comply with the critical areas ordinance.

13. Nuisance ⇦1

A "nuisance" is a substantial and unreasonable interference with the use and enjoyment of another person's property.

See publication Words and Phrases for other judicial constructions and definitions.

14. Nuisance ⇦1

If particular conduct interferes with the comfort and enjoyment of others, nuisance liability exists only when the conduct is unreasonable.

15. Nuisance ⇦1

In a nuisance action, court determines the reasonableness of a defendant's conduct by weighing the harm to the aggrieved party against the social utility of the activity.

16. Nuisance ⇦34, 53

Whether a nuisance exists generally is a question of fact.

17. Nuisance ⇦5

A lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner.

18. Nuisance ⇐61

Noise generated from shooting range constituted a public nuisance, even though property owner was not violating applicable noise regulations; loud rapid fire shooting occurred 7:00 a.m. to 10:00 p.m., seven days a week, the shooting sounds were clearly audible in the down range neighborhoods, at times, owner allowed the use of exploding targets, and the noise from the range interfered with the comfort and repose of nearby residents. WAC 173–60–040; West's RCWA 7.48.130.

19. Nuisance ⇐65

Neither the noise exemption for shooting ranges nor statute that provided that nothing done or maintained under the express authority of a statute could be deemed a nuisance precluded a finding that shooting noise from gun range constituted a public nuisance. West's RCWA 7.48.160, 70.107.080.

20. Nuisance ⇐61

Ongoing operation of shooting range without adequate physical facilities to confine bullets to the property created an ongoing risk of bullets escaping the property to injure persons and property and constituted a public nuisance. West's RCWA 7.48.120, 7.48.130.

21. Nuisance ⇐4

Nuisance can be based on a reasonable fear of harm.

22. Nuisance ⇐61

Gun club's unlawful expansion of its nonconforming use of property as a gun range and violation of various county code provisions regarding development of the property represented a public nuisance. West's RCWA 7.48.130.

23. Deeds ⇐110

Interpretation of a deed is a mixed question of fact and law.

24. Deeds ⇐93, 95

Goal in interpreting a deed is to discover and give effect to the parties' intent as expressed in the deed.

25. Deeds ⇐110

The parties' intent in a deed is a question of fact and the legal consequence of that intent is a question of law.

26. Counties ⇐110

Zoning and Planning ⇐1768

Improvement and expansion clauses in deed to shooting range property did not preclude enforcement of county development regulations for improvements on property; the improvement clause made no reference to the club's existing use, except to limit the club's use to eight acres, and the clause only referred to future modernization and did not ratify unpermitted development activities that occurred in the past.

27. Counties ⇐110

Zoning and Planning ⇐1768

Language in the public access clause in deed to shooting range property did not restrict the county from enforcing zoning regulations or seeking to abate nuisance conditions on the conveyed property.

28. Zoning and Planning ⇐1311

County's sale of shooting range property to gun club for the purpose of facilitating the club's continued existence did not prevent the county from insisting that it be operated in a manner consistent with the law and not unlawfully expand its nonconforming use as a gun range.

29. Estoppel ⇐62.1

Equitable estoppel against a governmental entity requires a party to prove five elements by clear and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is 'necessary to prevent a manifest injustice'; and (5) estoppel will not impair governmental functions.

30. Estoppel ⇐119

Whether equitable relief is appropriate is a question of law.

31. Estoppel ⇐62.3

County's general support for the shooting range's continued existence was not inconsistent with its current insistence that the range conform to development permitting requirements and operate in a manner not constituting a nuisance, and thus, county was not equitably estopped from bringing nuisance action against gun club.

32. Appeal and Error ⇐954(1)
Injunction ⇐1004

Injunctive relief is an equitable remedy, and appellate court reviews a trial court's decision to grant an injunction and the terms of that injunction for an abuse of discretion.

33. Zoning and Planning ⇐1750, 1752

Whether termination of a property's nonconforming use is an appropriate remedy for unlawful uses of that property is a question of law that is reviewed de novo; if termination of the nonconforming use is an appropriate remedy as a matter of law, appellate court applies the abuse of discretion standard in reviewing the trial court's decision to select that remedy.

34. Zoning and Planning ⇐1318

County code did not provide for termination of nonconforming use to remedy code violations or unlawful expansion of nonconforming use of shooting range property; use of the gun club's property as a shooting range remained lawful as a nonconforming use, and therefore any unlawful expansion of use, permitting violations, or nuisance activities could not trigger termination of the otherwise lawful nonconforming use.

35. Zoning and Planning ⇐1318

Termination of the gun club's nonconforming use status to use property as gun range was not the proper remedy under common law for club's unlawful expansion of its use, its unpermitted development activities, and its engaging in activities that constituted a nuisance.

36. Nuisance ⇐85

Trial court did not abuse its discretion in issuing permanent injunction restricting the use of certain firearms at shooting range and limiting the gun club's operating hours to abate public nuisance; the limitation of the activities was reasonably related to the noise-related nuisance and possibly to the safety-related nuisance. West's RCWA 7.48.200.

37. Amicus Curiae ⇐3

Court of Appeals does not need to consider the arguments raised solely by amici.

Brian David Chenoweth, Brooks MacInnes Foster, Chenoweth Law Group, PC, Portland, OR, for Appellant.

Jennine E. Christensen, Christine M. Palmer, Kitsap County Prosecutors Office, Port Orchard, WA, for Respondent.

David Scott Mann, Gendler & Mann LLP, Seattle, WA, Amicus Curiae on behalf of Ck Safe & Quiet, LLC.

Matthew A. Lind, Sherrard McGonagle Tizzano, PS, Poulsbo, WA, Amicus Curiae on behalf of Kitsap Alliance of Property Owners.

C.D. Michel, Michel & Associates, P.C., Long Beach, CA, Richard B. Sanders, Goodstein Law Group, Tacoma, WA, Amicus Curiae on behalf of National Rifle Association, Inc.

MAXA, J.

¶ 1 The Kitsap Rifle and Revolver Club appeals from the trial court's decision following a bench trial that the Club engaged in unlawful uses of its shooting range property. Specifically, the Club challenges the trial court's determinations that the Club had engaged in an impermissible expansion of its nonconforming use; that the Club's site development activities violated land use permitting requirements; and that excessive noise, unsafe conditions, and unpermitted development work at the shooting range constituted a public nuisance. The Club also argues that even if its activities were unlawful, the language of the deed of sale transferring the property title from Kitsap County to the Club prevents the County from filing suit based on these activities. Finally, the Club challenges the trial court's remedies: terminating the Club's nonconforming use status and entering a permanent injunction restricting the Club's use of the property as a

shooting range until it obtains a conditional use permit, restricting the use of certain firearms at the Club, and limiting the Club's hours of operation to abate the nuisance.[1]

¶ 2 We hold that (1) the Club's commercial use of the property and dramatically increased noise levels since 1993, but not the club's change in its operating hours, constituted an impermissible expansion of its nonconforming use; (2) the Club's development work unlawfully violated various County land use permitting requirements; (3) the excessive noise, unsafe conditions, and unpermitted development work constituted a public nuisance; (4) the language in the property's deed of sale from the County to the Club did not preclude the County from challenging the Club's expansion of use, permit violations, and nuisance activities; and (5) the trial court did not abuse its discretion in entering an injunction restricting the use of certain firearms at the shooting range and limiting the Club's operating hours to abate the public nuisance. We affirm the trial court on these issues except for the trial court's ruling that the Club's change in operating hours constituted an impermissible expansion of its nonconforming use. We reverse on that issue.

¶ 3 However, we reverse the trial court's ruling that terminating the Club's nonconforming use status as a shooting range is a proper remedy for the Club's conduct. Instead, we hold that the appropriate remedy involves specifically addressing the impermissible expansion of the Club's nonconforming use and unpermitted development activities while allowing the Club to operate as a shooting range. Accordingly, we vacate the injunction precluding the Club's use of the property as a shooting range and remand for the trial court to fashion an appropriate remedy for the Club's unlawful expansion of its nonconforming use and for the permitting violations.

FACTS

¶ 4 The Club has operated a shooting range in its present location in Bremerton since it was founded for "sport and national defense" in 1926. Clerk's Papers (CP) at 4054, For decades, the Club leased a 72–acre parcel of land from the Washington Department of National Resources (DNR). The two most recent leases stated that the Club was permitted to use eight acres of the property as a shooting range, with the remaining acreage serving as a buffer and safety zone.

Confirmation of Nonconforming Use

¶ 5 In 1993, the chairman of the Kitsap County Board of Commissioners (Board) notified the Club and three other shooting ranges located in Kitsap County that the County considered each to be lawfully established, nonconforming uses. This notice was prompted by the shooting ranges' concern over a proposed new ordinance limiting the location of shooting ranges. (Ordinance 50–B–1993). The County concedes that as of 1993 the Club's use of the property as a shooting range constituted a lawful nonconforming use.

Property Usage Since 1993

¶ 6 As of 1993, the Club operated a rifle and pistol range, and some of its members participated in shooting activities in the wooded periphery of the range. Shooting activities at the range occurred only occasionally—usually on weekends and during the fall "sight-in" season for hunting—and only during daylight hours. CP at 4059. Rapid-fire shooting, use of automatic weapons, and the use of cannons occurred infrequently in the early 1990s.

¶ 7 Subsequently, the Club's property use changed. The Club allowed shooting between 7:00 AM and 10:00 PM, seven days a week. The property frequently was used for regularly scheduled shooting practices and practical shooting competitions where participants used multiple shooting bays for rapid-fire shooting in multiple directions. Loud rapid-fire shooting often began as early as 7:00 AM and could last as late as 10:00 PM. Fully automatic weapons were regularly used

1. The County initially filed a cross appeal. We later granted the County's motion to dismiss its cross appeal.

at the Club, and the Club also allowed use of exploding targets and cannons. Commercial use of the Club also increased, including private for-profit companies using the Club for a variety of firearms courses and small arms training exercises for military personnel. The U.S. Navy also hosted firearms exercises at the Club once in November 2009.

¶ 8 The expanded hours, commercial use, use of explosive devices and higher caliber weaponry, and practical shooting competitions increased the noise level of the Club's activities beginning in approximately 2005 or 2006. Shooting sounds changed from "occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration." CP at 4073. The noise from the Club disrupted neighboring residents' indoor and outdoor activities.

¶ 9 The shooting range's increased use also generated safety concerns. The Club operated a "blue sky" range with no overhead baffles to stop the escape of accidentally or negligently discharged bullets. CP at 4070. There were allegations that bullets had impacted nearby residential developments.

Range Development Since 1996

¶ 10 From approximately 1996 to 2010, the Club engaged in extensive shooting range development within the eight acres of historical use, including: (1) extensive clearing, grading, and excavating wooded or semi-wooded areas to create "shooting bays," which were flanked by earthen berms and backstops; (2) large scale earthwork activities and tree/vegetation removal in a 2.85 acre area to create what was known as the 300 meter rifle range;[2] (3) replacing the water course that ran across the rifle range with two 475–foot culverts, which required extensive work—some of which was within an area designated as a wetland buffer; (4) extending earthen berms along the rifle range and over the newly buried culverts which required excavating and refilling soil in excess of 150 cubic yards; and (5) cutting steep slopes higher than five feet at several locations on the property.

¶ 11 The Club did not obtain conditional use permits, site development activity permits, or any of the other permits required under the Kitsap County Code for its development activities.

Club's Purchase of Property

¶ 12 In early 2009, the County and DNR negotiated a land swap that included the 72 acres the Club leased. Concerned about its continued existence, the Club met with County officials to discuss the transaction's potential implications on its lease. The Club was eager to own the property to ensure its shooting range's continued existence, and the County was not interested in owning the property because of concern about potential heavy metal contamination from its long term shooting range use. In May 2009, the Board approved the sale of the 72–acre parcel to the Club.

¶ 13 In June, DNR conveyed to the County several large parcels of land, including the 72 acres leased by the Club. The County then immediately conveyed the 72–acre parcel to the Club through an agreed bargain and sale deed with restrictive covenants.

¶ 14 The bargain and sale deed states that the Club "shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight (8) acres of active shooting ranges." CP at 4088. The deed also states that the Club may "upgrade or improve the property and/or facilities within the historical approximately eight (8) acres in a manner consistent with 'modernizing' the facilities consistent with management practices for a modern shooting range." CP at 4088. The deed does not identify or address any property use disputes between the Club and County.

Lawsuit and Trial

¶ 15 In 2011, the County filed a complaint for an injunction, declaratory judgment, and nuisance abatement against the Club. The County alleged that the Club had impermissibly expanded its nonconforming use as a

2. The Club abandoned its plans to develop the proposed 300 meter rifle range because County staff advised the Club that a conditional use permit would be required for the project.

shooting range and had engaged in unlawful development activities because the Club lacked the required permits. The County also alleged that the Club's activities constituted a noise and safety public nuisance. The County requested termination of the Club's nonconforming use status and abatement of the nuisance.

¶ 16 After a lengthy bench trial, the trial court entered extensive findings of fact and conclusions of law. The trial court concluded that the Club's shooting range operation was no longer a legal nonconforming use because (1) the Club's activities constituted an expansion rather than an intensification of the existing nonconforming use; (2) the Club's use of the property was illegal because it failed to obtain proper permits for the development work; and (3) the Club's activities constituted a nuisance per se, a statutory public nuisance, and a common law nuisance due to the noise, safety, and unpermitted land use issues. The trial court issued a permanent injunction prohibiting use of the Club's property as a shooting range until issuance of a conditional use permit, which the County could condition upon application for all after-the-fact permits required under Kitsap County Code (KCC) Title 12 and 19. The trial court also issued a permanent injunction prohibiting the use of fully automatic firearms, rifles of greater than nominal .30 caliber, exploding targets and cannons, and the property's use as an outdoor shooting range before 9:00 AM or after 7:00 PM.

¶ 17 The Club appeals. We granted a stay of the trial court's injunction against all shooting range activities on the Club property until such time as it receives a conditional use permit. However, we imposed a number of conditions on the Club's shooting range operations pending our decision.

ANALYSIS

Standard of Review

¶ 18 We review a trial court's decision following a bench trial by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law. *Casterline v. Roberts*, 168 Wash.App. 376, 381, 284 P.3d 743 (2012). Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003). Here, the Club did not assign error to any of the trial court's findings of fact, and only challenged four findings regarding the deed in its brief.[3] Accordingly, we treat the unchallenged findings of fact as verities on appeal. *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004).

¶ 19 The process of determining the applicable law and applying it to the facts is a question of law that we review de novo. *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wash.2d 676, 687, 167 P.3d 1112 (2007). We also review other questions of law de novo. *Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wash.App. 553, 559, 266 P.3d 924 (2011).

¶ 20 We apply customary principles of appellate review to an appeal of a declaratory judgment reviewing the trial court's findings of fact for substantial evidence and the trial court's conclusions of law de novo. *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n*, 173 Wash.App. 778, 789, 295 P.3d 314 (2013).

The Club's Unlawful Activities

¶ 21 The Club argues that the trial court erred in ruling that the Club's use of the property since 1993 was unlawful because (1) the Club's activities constituted an expansion rather than an intensification of the existing nonconforming use, (2) the Club failed to obtain proper permits for its extensive development work, and (3) the Club's activities constituted a public nuisance. We disagree and hold that the trial court's unchallenged findings of fact support these legal conclusions.

3. In the body of its brief the Club argued that the evidence did not support findings of fact 23, 25, 26, and 57. These findings primarily involve the trial court's interpretation of the deed transferring title from the County to the Club. Although the Club's challenge to these findings did not comply with RAP 10.3(g), in our discretion we will consider the Club's challenge to these findings.

A. Expansion of Nonconforming Use

¶ 22 The Club argues that the trial court erred in ruling that the Club engaged in an impermissible expansion of the existing nonconforming use by (1) increasing its operating hours; (2) allowing commercial use of the Club (including military training); and (3) increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber, and practical shooting. We hold that increasing the operating hours represented an intensification rather than an expansion of use, but agree that the other two categories of changed use constituted expansions of the Club's nonconforming use.

1. Changed Use—General Principles

[1, 2] ¶ 23 A legal nonconforming use is a use that "lawfully existed" before a change in regulation and is allowed to continue although it does not comply with the current regulations. *King County, Dep't of Dev. & Envtl. Servs. v. King County*, 177 Wash.2d 636, 643, 305 P.3d 240 (2013); *Rhod–A–Zalea v. Snohomish County*, 136 Wash.2d 1, 6, 959 P.2d 1024 (1998). Nonconforming uses are allowed to continue because it would be unfair, and perhaps a violation of due process, to require an immediate cessation of such a use. *King County, DDES*, 177 Wash.2d at 643, 305 P.3d 240; *Rhod–A–Zalea*, 136 Wash.2d at 7, 959 P.2d 1024.

[3, 4] ¶ 24 As our Supreme Court noted, as time passes a nonconforming property use may grow in volume or intensity. *Keller v. City of Bellingham*, 92 Wash.2d 726, 731, 600 P.2d 1276 (1979). Although a property owner generally has a right to continue a protected nonconforming use, there is no right to "significantly change, alter, extend, or enlarge the existing use." *Rhod–A–Zalea*, 136 Wash.2d at 7, 959 P.2d 1024. On the other hand, an "intensification" of the nonconforming use generally is permissible. *Keller*, 92 Wash.2d at 731, 600 P.2d 1276. "Under Washington common law, nonconforming uses may be intensified, but not expanded." *City of University Place v. McGuire*, 144 Wash.2d 640, 649, 30 P.3d 453 (2001). Our Supreme Court stated the standard for distinguishing between intensification and expansion:

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is different in kind from the nonconforming use in existence when the zoning ordinance was adopted.

Keller, 92 Wash.2d at 731, 600 P.2d 1276 (internal citations omitted).

¶ 25 In *Keller*, our Supreme Court determined that a chlorine manufacturing company's addition of six cells to bring its building to design capacity (which increased its chlorine production by 20–25 percent) constituted an intensification rather than an expansion, and thus was permissible under the company's chlorine manufacturing nonconforming use status. 92 Wash.2d at 727–28, 731, 600 P.2d 1276. The court's decision was based on the Bellingham City Code (BCC), which stated that a nonconforming use " 'shall not be enlarged, relocated or rearranged,' " but did not specifically prohibit intensification. *Keller*, 92 Wash.2d at 728 731, 600 P.2d 1276 (quoting BCC § 20.06.027(b)(2)). The Supreme Court highlighted the trial court's unchallenged factual findings that the addition of the new cells "wrought no change in the nature or character of the nonconforming use" and had no significant effect on the neighborhood or surrounding environment. *Keller*, 92 Wash.2d at 731–32, 600 P.2d 1276.

2. Kitsap County Code Provisions

[5, 6] ¶ 26 Our Supreme Court in *Rhod–A–Zalea* noted that the Washington statutes are silent regarding regulation of nonconforming uses and that the legislature "has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances." 136 Wash.2d at 7, 959 P.2d 1024. As a result, "local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution." *Rhod–A–*

Zalea, 136 Wash.2d at 7, 959 P.2d 1024. The analysis in *Keller* is consistent with these principles. Accordingly, we first determine whether the Club's increased activity is permissible under the Code provisions that regulate nonconforming uses, interpreted within due process limits.

¶ 27 Title 17 of the Code relates to zoning. KCC 17.460.020 provides:

> Where a lawful use of land exists that is not allowed under current regulations, but was allowed when the use was initially established, that use may be continued so long as it remains otherwise lawful, and shall be deemed a nonconforming use.

¶ 28 This ordinance reflects that generally the Code "is intended to permit these nonconformities to continue until they are removed or discontinued." KCC 17.460.010.

¶ 29 The Code contains two provisions that address when a nonconforming use changes. First, KCC 17.460.020(C) prohibits the geographic expansion or relocation of nonconforming uses:

> If an existing nonconforming use or portion thereof, not housed or enclosed within a structure, occupies a portion of a lot or parcel of land on the effective date hereof, *the area of such use may not be expanded*, nor shall the use or any part thereof, be moved to any other portion of the property not historically used or occupied for such use.

(Emphasis added). This ordinance prohibits expansion of only the *area* of a nonconforming use—i.e., the footprint of the use.

¶ 30 With one possible exception,[4] the Club did not violate this provision. The trial court concluded that the Club "enjoyed a legal protected nonconforming status for historic use of the existing eight acre range." CP at 4075. The Club developed portions of its "historic eight acres" by creating shooting bays, beginning preliminary work for relocating its shooting range, and constructing culverts to convey a water course across the range. CP at 4060. There is no allegation that any of this work took place outside the existing area of the Club's nonconforming use. Further, all of the activities that the trial court found constituted an expansion of use took place within the eight acre area.

[7] ¶ 31 Second, former KCC 17.455.060 (1998), which was repealed after the trial court rendered its opinion,[5] provided:

> A use or structure not conforming to the zone in which it is located shall not be *altered or enlarged in any manner*, unless such alteration or enlargement would bring the use or structure into greater conformity with the uses permitted within, or requirements of, the zone in which it is located.

(Emphasis added). The court in *Keller* determined that the term "enlarged" in the ordinance at issue did not prohibit intensification. 92 Wash.2d at 731, 600 P.2d 1276. "Alter" is defined as "to cause to become different in some particular characteristic ... without changing into something else." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 63 (2002). Arguably, the prohibition, on *altering* a nonconforming use could be interpreted as prohibiting every intensification of that use. But the County does not argue that former KCC 17.455.060 prohibits intensification. Further, as in *Keller*, the Code does not expressly prohibit intensification of a nonconforming use. And interpreting former KCC 17.455.060 strictly to prohibit any change in use would conflict with the rule that zoning ordinances in derogation of the common law should be strictly construed. *Keller*, 92 Wash.2d at 730, 600 P.2d 1276.

4. The one possible violation of KCC 17.460.020 involved the Club's work on the proposed 300 meter range. It is unclear whether the proposed 300 meter range was outside the historic eight acres. The trial court made no factual finding on this issue, although the parties imply that this project went beyond the existing area. In any event, when the County objected the Club discontinued its work in this area. Because the project was abandoned, at the time of trial the Club no longer was in violation of KCC 17.460.020. Apparently, the Club currently is using this area for storage but is willing to move the items if a court determines it is outside its historical use area.

5. Neither party discusses the effect of former KCC 17.455.060 being repealed. Because we interpret this ordinance consistent with the common law, we need not address this issue.

¶ 32 Based on these factors, we interpret former KCC 17.455.060 as adopting the common law and prohibiting "expansion" but not "intensification" of a nonconforming use. As a result, we must analyze whether the Club's use since 1993 constitutes an expansion or intensification of use under common law principles.

3. Expansion vs. Intensification

[8] ¶ 33 As discussed above, *Keller* described the concept of "expansion" as an increase in the volume or intensity of the use of such magnitude that effects a "fundamental change" in the use, and the concept of "intensification" as where the "nature and character" of the use is unchanged and substantially the same facilities are used. 92 Wash.2d at 731, 600 P.2d 1276. According to *Keller*, the test is whether the intensified use is "different in kind" than the nonconforming use. 92 Wash.2d at 731, 600 P.2d 1276. Although the case law is somewhat unclear, we hold that the expansion/intensification determination is a question of law. *See City of Mercer Island v. Kaltenbach*, 60 Wash.2d 105, 107, 371 P.2d 1009 (1962) (whether ordinances allow a use must be determined as a matter of law); *Meridian Minerals Co. v. King County*, 61 Wash.App. 195, 209 n. 14, 810 P.2d 31 (1991) (whether a zoning code prohibits a land use is a question of law).[6]

¶ 34 The trial court concluded that three activities "significantly changed, altered, extended and enlarged the existing use" and therefore constituted an expansion of use: "(1) expanded hours; (2) commercial, for-profit use (including military training); [and] (3) increasing the noise levels by allowing explosive devises [sic], high caliber weaponry greater than 30 caliber and practical shooting." CP at 4075–76. We hold that the Club's increased hours did not constitute an expansion of its nonconforming use. However, we hold that the other two activities did constitute an impermissible expansion of use.

[9] ¶ 35 First, the trial court found that the Club currently allowed shooting between 7:00 AM and 10:00 PM, seven days a week. But the trial court found that in 1993 shooting occurred during daylight hours only, sounds of shooting could be heard primarily on the weekends and early mornings in September (hunter sight-in season), and hours of active shooting were considerably fewer than today. We hold that the increased hours of shooting range activities here do not effect a "fundamental change" in the use and do not involve a use "different in kind" than the nonconforming use. *Keller*, 92 Wash.2d at 731, 600 P.2d 1276. Instead, the nature and character of the use has remained unchanged despite the expanded hours. By definition, this represents an intensification of use rather than an expansion. We hold that the trial court's findings do not support a legal conclusion that the increased hours of shooting constituted an expansion of the Club's use.

[10] ¶ 36 Second, the trial court made unchallenged findings that from 2002 through 2010 three for-profit companies regularly provided a variety of firearms courses at the Club's property, many for active duty Navy personnel. The trial court found that one company provided training for approximately 20 people at a time over three consecutive weekdays as often as three weeks per month from 2004 through 2010. Before this time, there was no evidence of for-profit firearm training at the property. Because the training courses involved the operation of firearms, that use on one level was not different than use of the property as a gun club's shooting range. However, using the property to operate a commercial business primarily serving military personnel represented a fundamental change in use and was completely different in kind than using the property as a shooting range for Club members and the general public.

¶ 37 We hold that the trial court's findings support the legal conclusion that the commercial and military use of the shooting range constituted an expansion of the Club's nonconforming use.

[11] ¶ 38 Third, the trial court made unchallenged findings that the noise generated

6. *But see Keller*, 92 Wash.2d at 732, 600 P.2d 1276, in which our Supreme Court discusses the trial court's *finding of fact* that "intensification wrought no change in the nature or character of the nonconforming use."

at the Club's property changed significantly between 1993 and the present. The trial court found:

> Shooting sounds from the Property have changed from occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration. Rapid fire shooting sounds from the Property have become common, and the rapid-firing often goes on for hours at a time.

CP at 4073. The trial court further found that "[u]se of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the 'sounds of war.'" CP at 4073. Similarly, the use of cannons and exploding targets caused loud booming sounds. By contrast, the trial court found that rapid-fire shooting, use of automatic weapons, and the use of cannons and explosives at the property occurred infrequently in the early 1990s.

¶ 39 The types of weapons and shooting patterns used currently do not necessarily involve a different character of use than in 1993, when similar weapons and shooting patterns were used infrequently. However, we hold that the frequent and drastically increased noise levels found to exist at the Club constituted a fundamental change in the use of the property and that this change represented a use different in kind than the Club's 1993 property use.

¶ 40 We hold that the trial court's findings support a conclusion that the extensive commercial and military use and dramatically increased noise levels constituted expansions of the Club's nonconforming use, which is unlawful under the common law and former KCC 17.455.060.

B. Violations of Land Use Permitting Requirements

[12] ¶ 41 The trial court concluded that beginning in 1996, the Club violated various Code provisions by failing to obtain site development activity permits for extensive property development work—including grading, excavating, and filling—and failing to comply with the critical areas ordinance, KCC Title 19. The Club does not deny that it violated certain Code provisions for unpermitted work, nor does it claim that it ordinarily would not be subject to the permitting requirements,[7] And it is settled that nonconforming uses are subject to subsequently enacted reasonable police power regulations unless the regulation would immediately terminate the nonconforming use. *Rhod–A–Zalea*, 136 Wash.2d at 9, 12, 959 P.2d 1024(holding that nonconforming use of land for peat mining facility is subject to subsequent grading permit requirement); KCC 17.530.030 states that any use in violation of Code provisions is unlawful. Accordingly, there is no dispute that the Club's unpermitted development work on the property constituted unlawful uses.

C. Public Nuisance

¶ 42 The Club argues that the trial court erred in ruling both that its shooting range activities constituted a nuisance and that it was a "public" nuisance. We disagree.

¶ 43 The trial court concluded that the Club's activities on the property constituted a public nuisance in three ways: "(1) ongoing noise caused by shooting activities, (2) use of explosives at the Property, and (3) the Property's ongoing operation without adequate physical facilities to confine bullets to the Property." CP at 4075. The trial court also concluded that the Club's expansion of its nonconforming use and unpermitted development activities constituted a public nuisance. More specifically, the trial court concluded that these activities constituted a public nuisance per se, a statutory public nuisance in violation of RCW 7.48.010, .120, .130, .140(1), and .140(2) and KCC 17.455.110, .530.030, and .110.515, and a common law nuisance based on noise and safety issues. We hold that the trial court's unchallenged factual findings support its conclusion that the Club's activities constituted a public nuisance.

7. The Club argues that the provisions of the deed transferring the property from the County relieved the Club from compliance with development permitting requirements within its historical eight acres. This argument is discussed below.

1. General Principles

[13] ¶ 44 A nuisance is a substantial and unreasonable interference with the use and enjoyment of another person's property. *Grundy v. Thurston County,* 155 Wash.2d 1, 6, 117 P.3d 1089 (2005). Washington's nuisance law is codified in chapter 7.48 RCW. RCW 7.48.010 defines an actionable nuisance as "whatever is injurious to health ... or offensive to the senses, ... so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.120 also defines nuisance as an "act or omission [that] either annoys, injures or endangers the comfort, repose, health or safety of others ... or in any way renders other persons insecure in life, or in the use of property."

¶ 45 The Code contains several nuisance provisions. KCC 9.56.020(10) defines nuisance similar to RCW 7.48.120. KCC 17.455.110 prohibits land uses that "produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses." KCC 17.530.030 provides that "[a]ny use ... in violation of this title is unlawful, and a public nuisance." Finally, KCC 17.110.515 states that "any violation of this title [zoning] shall constitute a nuisance per se."

[14–16] ¶ 46 If particular conduct interferes with the comfort and enjoyment of others, nuisance liability exists only when the conduct is unreasonable. *Lakey v. Puget Sound Energy, Inc.,* 176 Wash.2d 909, 923, 296 P.3d 860 (2013). "We determine the reasonableness of a defendant's conduct by weighing the harm to the aggrieved party against the social utility of the activity." *Lakey,* 176 Wash.2d at 923, 296 P.3d 860; *see also* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 10.3, at 656–57 (2d ed.2004) (whether a given activity is a nuisance involves balancing the rights of enjoyment and free use of land between possessors of land based on the attendant circumstances). "'A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case.'" *Shields v. Spokane Sch. Dist. No. 81,* 31 Wash.2d 247, 257, 196 P.2d 352, 358 (1948) (quoting 46 C.J. 655, NUISANCES, § 20). Whether a nuisance exists generally is a question of fact. *Lakey,* 176 Wash.2d at 924, 296 P.3d 860; *Tiegs v. Watts,* 135 Wash.2d 1, 15, 954 P.2d 877 (1998).

[17] ¶ 47 A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance: 17 STOEBUCK & WEAVER, § 10.3, at 656; *see also Tiegs,* 135 Wash.2d at 13, 954 P.2d 877. However, a lawful activity also can be a nuisance. *Grundy,* 155 Wash.2d at 7 n. 5, 117 P.3d 1089. "[A] lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner." *Hardin v. Olympic Portland Cement Co.,* 89 Wash. 320, 325, 154 P. 450, 451 (1916).

2. Excessive Noise

[18] ¶ 48 The Club argues that the trial court erred in ruling that noise generated from the shooting range's activities constituted a nuisance. We disagree.

a. Unchallenged Findings of Fact

¶ 49 The Club does not assign error to any of the trial court's findings of fact regarding noise, but it challenges the trial court's "conclusion" that the conditions constituted a nuisance. But the trial court's determination that the conditions constituted a nuisance actually is a factual finding. *Lakey,* 176 Wash.2d at 924, 296 P.3d 860; *Tiegs,* 135 Wash.2d at 15, 954 P.2d 877. Therefore, our review is limited to determining whether the record contains substantial evidence to support the trial court's finding that the noise generated from the Club's activities was a substantial and unreasonable interference with neighbors' use and enjoyment of their property. *Casterline,* 168 Wash.App. at 381, 284 P.3d 743.

¶ 50 The trial court made unchallenged findings that (1) loud rapid fire shooting occurred 7:00 AM to 10:00 PM, seven days a week; (2) the shooting sounds were "clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration," CP at 4073; (3) at times, the use of fully automatic weapons or the constant firing of semi-automatic weapons made residents feel exposed to the "sounds of war," CP at 4073; (4) the Club allowed the use of exploding targets, including Tannerite and cannons, which caused loud "booming" sounds in residential neighborhoods within two miles of the Club property and caused houses to shake, CP at 4074; (5) the noise from the range interfered with the comfort and repose of nearby residents, interfered with their use and enjoyment of their property, and had increased in the past five to six years; (6) the interference was common, occurred at unacceptable hours, and was disruptive of both indoor and outdoor activities; and (7) the description of noise interference was representative of the experience of a significant number of homeowners within two miles of the Club property.

¶ 51 Based on these findings of fact, the trial court found that the ongoing noise caused by the shooting range—specifically the Club's hours of operation, caliber of weapons allowed to be used, use of exploding targets and cannons, hours and frequency of "practical shooting," and automatic weapons use—was substantial and unreasonable, and therefore constituted common law public nuisance and statutory public nuisance conditions under RCW 7.48.120, KCC 17.530.030, and KCC 17.110.515. CP at 4078. The undisputed facts were sufficient to support this finding.

¶ 52 The trial court heard testimony, considered the evidence, and found that the noise was significant, frequent, and disruptive, and that it interfered with the surrounding property's use and enjoyment. The record contains substantial evidence to support these findings. Accordingly, we hold that the trial court did not err in finding that excessive noise from the Club's activities constituted a nuisance.

b. Noise Ordinances

¶ 53 The Club argues that despite the trial court's factual findings, noise from its activities cannot constitute a nuisance because the County failed to present evidence that it violated state and County noise ordinances and provided no objective measurement of noise. We disagree.

¶ 54 Although WAC 173–60–040 provides maximum noise levels, related regulations generally defer to local governments to regulate noise. *See* WAC 173–60–060, –110. Chapter 10.28 KCC provides maximum permissible environmental noise levels for the various land use zones. KCC 10.28.030–.040. But a violation may occur without noise measurements being made. KCC 10.28.010(b), .130. KCC 10.28.145 also prohibits a "public disturbance" noise.

¶ 55 The Club cites no Washington authority for the proposition that noise cannot constitute a nuisance unless it violates applicable noise regulations and Code provisions. None of the nuisance statutes or Code provisions require that a nuisance arise from a statutory or regulatory violation. A nuisance exists if there has been a substantial and unreasonable interference with the use and enjoyment of property. *Grundy*, 155 Wash.2d at 6, 117 P.3d 1089. The trial court's unchallenged findings of fact support a determination that noise the Club generates constitutes a nuisance regardless of whether the noise level exceeds the specified decibel level.

c. Noise Exemption for Shooting Ranges

[19] ¶ 56 The Club argues that noise from the shooting range cannot constitute a nuisance as a matter of law because noise regulations exempt shooting ranges. Because this argument presents a legal issue, we review it de novo. *Recreational Equip.*, 165 Wash.App. at 559, 266 P.3d 924. We disagree with the Club.

¶ 57 Sounds created by firearm discharges on authorized shooting ranges are exempt from KCC 10.28.040 (maximum permissible environmental noise levels) and KCC 10.28.145 (public disturbance noises) between the hours of 7:00 AM and 10:00 PM. KCC 10.28.050. The Washington Department of

Ecology also exempts sounds created by firearms discharged on authorized shooting ranges from its maximum noise level regulations. RCW 70.107.080; WAC 173–60–050(1)(b). The Code broadly defines "firearm" as "any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion," including rifles, pistols, shotguns, and machine guns. KCC 10.24.080. As a result, the noise from the weapons being fired at the Club's range falls within the noise exemption provisions of KCC 10.28.050, and thus is exempt from the maximum permissible environmental noise levels and public disturbance noise restrictions.[8]

¶ 58 But once again, the Club cites no authority for the proposition that an exemption from noise ordinances affects the determination of whether noise constitutes a nuisance. Because a nuisance can be found even if there is no violation of noise ordinances, the exemption from such ordinances is immaterial.

¶ 59 The Club also argues that the exemption of shooting range noise from the state and local noise ordinances should be considered an express authority to' make that noise. This argument is based on RCW 7.48.160, which provides that nothing done or maintained under the express authority of a statute can be deemed a nuisance.

¶ 60 Our Supreme Court addressed a similar issue in *Grundy*. In that case, a private person brought a public nuisance claim against Thurston County and a private nuisance claim against. her neighbor, for raising his seawall which left her property vulnerable to flooding. *Grundy*, 155 Wash.2d at 4–5, 117 P.3d 1089. The public nuisance claim was based on assertions that Thurston County had wrongfully and illegally allowed the project by deciding that the seawall qualified for an administrative exemption from substantial permitting requirements. *Grundy*, 155 Wash.2d at 4–5, 117 P.3d 1089. Rather than challenge Thurston County's administrative decision, the objecting neighbor sought to abate the seawall as a nuisance. *Grundy*, 155 Wash.2d at 4–5, 117 P.3d 1089. Although the Supreme Court did not reach the public nuisance issue, it disagreed with the Court of Appeals' suggestion that the public nuisance was foreclosed based on the rule that nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. *Grundy*, 155 Wash.2d at 7 n. 5, 117 P.3d 1089. The Supreme Court stated that a lawful action may still be a nuisance based on the unreasonableness of the locality, manner of use, and circumstances of the case. *Grundy*, 155 Wash.2d at 7 n. 5, 117 P.3d 1089.

¶ 61 We interpret RCW 7.48.160 as requiring a direct authorization of action to escape the possibility of nuisance. *See Judd v. Bernard*, 49 Wash.2d 619, 621, 304 P.2d 1046 (1956) (State's eradication of fish in lake is not a nuisance because a statute authorizes the fish and wildlife department to remove or kill fish for game management purposes). There is no such direct authorization here. We hold that the noise exemption and RCW 7.48.160 do not foreclose the County's nuisance claim based on noise.

¶ 62 Finally, the Club argues that even if the noise exemption does not automatically determine whether a nuisance exists, the noise statutes and ordinances (including the shooting range exemption) portray the community standards. The Club claims that the exemption reflects the community's decision that authorized shooting range sounds during designated hours are not unreasonable. Regulations affecting land use may be relevant in "determining whether one property owner has a reasonable expectation to be free of a particular interference resulting from use of neighboring property." 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 3.13, at 150 (4th ed.2013). But the shooting range exemption is merely one factor to consider in determining the reasonableness of the Club's activities. The exemption does not undermine the trial court's findings that the Club's activities constituted a nuisance.

8. However, the noise from the use of exploding targets, including Tannerite targets, is not noise from the discharge of firearms and therefore is not exempt from the noise ordinances.

¶ 63 We hold that the trial court's unchallenged factual findings supported its determination that the noise generated from the Club's activities constituted a statutory and common law nuisance.

3. Safety Issues

[20] ¶ 64 The Club argues that the trial court erred in ruling that safety issues associated with the shooting range's activities constituted a nuisance. We disagree because the trial court's unchallenged factual findings support its ruling.

a. Unchallenged Findings of Fact

¶ 65 The Club did not assign error to any of the trial court's findings of fact regarding safety, but it challenges the trial court's "conclusion" that the conditions constituted a nuisance. However, as discussed above regarding noise, the trial court's determination that the unsafe conditions constituted a nuisance actually is a factual finding. *Lakey*, 176 Wash.2d at 924, 296 P.3d 860; *Tiegs*, 135 Wash.2d at 15, 954 P.2d 877. Therefore, once again our review is limited to determining whether the record contains substantial evidence to support the trial court's finding that safety issues arising from the Club's activities were a substantial and unreasonable interference with neighbors' use and enjoyment of their property. *Casterline*, 168 Wash.App. at 381, 284 P.3d 743.

¶ 66 The trial court made unchallenged findings that (1) the Club's property was a "blue sky" range, with no overhead baffles to stop accidently or negligently discharged bullets, CP at 4070; (2) more likely than not, bullets have escaped and will escape the Club's shooting areas and possibly will strike persons or property in the future based on the firearms used at the range, vulnerabilities of neighboring residential property, allegations of bullet impacts in nearby residential developments, evidence of bullets lodged in trees above berms, and the opinions of testifying experts; and (3) the Club's range facilities, including safety protocols, were inadequate to prevent bullets from leaving the property.

¶ 67 Based on these findings of fact, the trial court determined that the ongoing operation of the range without adequate physical facilities to confine bullets to the property creates an ongoing risk of bullets escaping the property to injure persons and property and constitutes a public nuisance under RCW 7.48.120, KCC 17.530.030, and KCC 17.110.515. The undisputed facts were sufficient to support a finding that the safety issues arising from the Club's activities were unreasonable and constituted a "substantial and unreasonable interference" with the surrounding property's use and enjoyment. *Grundy*, 155 Wash.2d at 6, 117 P.3d 1089.

¶ 68 The trial court heard testimony, considered the evidence, and found that the safety issues were significant and interfered with the surrounding property's use and enjoyment. Accordingly, we hold that the evidence was sufficient to support the trial court's determination that safety issues from the Club's activities created a nuisance.

b. Probability of Harm

¶ 69 The Club also argues that the trial court's findings do not support its conclusion that the range is a safety nuisance because the trial court did not find that any bullet from the Club had ever struck a person or nearby property. Similarly, the Club points out that the trial court found only that it was possible, not probable, that bullets could strike persons or property, and argues that the mere possibility of harm cannot constitute a safety nuisance. We disagree.

[21] ¶ 70 The Club provides no authority that a finding of actual harm is necessary to support a determination that an activity constitutes a safety nuisance. And contrary to the Club's argument, nuisance can be based on a reasonable fear of harm. "Where a defendant's conduct causes a reasonable fear of using property, this constitutes an injury taking the form of an interference with property." *Lakey*, 176 Wash.2d at 923, 296 P.3d 860. "[T]his fear need not be scientifically founded, so long as it is not unreasonable." *Lakey*, 176 Wash.2d at 923, 296 P.3d 860.

¶ 71 In *Everett v. Paschall*, our Supreme Court enjoined as a nuisance a tuberculosis sanitarium maintained in a residential section of the city where the reasonable fear and

dread of the disease was such that it depreciated the value of the adjacent property, disturbed the minds of residents, and interfered with the residents' comfortable enjoyment of their property despite that the sanitarium imposed no real danger. 61 Wash. 47, 50–53, 111 P. 879 (1910). And in *Ferry v. City of Seattle*, the Supreme Court affirmed the trial court's decision to enjoin as a nuisance the erection of a water storage reservoir in a city park due to residents' very real and present apprehension that it may collapse and flood the neighborhood damaging property and imperiling residents. 116 Wash. 648, 662–63, 666, 203 P. 40 (1922). The court held that "the question of the reasonableness of the apprehension turns again, not only on the probable breaking of the reservoir, but the realization of the extent of the injury which would certainly ensue; that is to say the court will look to consequences in determining whether the fear existing is reasonable." *Ferry*, 116 Wash. at 662, 200 P. 336.

¶ 72 In any event, whether an activity causes actual or threatened harm or a reasonable fear is not the dispositive issue. The crucial question for nuisance liability is whether the challenged activities are reasonable when weighing the harm to the aggrieved party against the social utility of the activity. *Lakey*, 176 Wash.2d at 923, 296 P.3d 860. For instance, in *Lakey*, neighbors of Puget Sound Energy (PSE) alleged that the electromagnetic fields (EMFs) emanating from its substation constituted a private and public nuisance. 176 Wash.2d at 914, 296 P.3d 860. Our Supreme Court concluded that even though the neighbors had demonstrated reasonable fear from EMF exposure, as a matter of law PSE's operation of the substation was reasonable based on weighing the harm against the social utility. *Lakey*, 176 Wash.2d at 923–25, 296 P.3d 860.

¶ 73 Here, the trial court found after weighing extensive evidence that the Club's range facilities and safety protocols were inadequate to prevent bullets from leaving the property and that more likely than not bullets will escape the Club's shooting areas. The trial court also found that the Club's property was close to "numerous residential properties and civilian populations." CP at 4078. These undisputed facts support the trial court's determination that the Club's shooting activities created a risk of property damage and personal injury to neighboring residents, and therefore were unreasonable under the circumstances.

¶ 74 The trial court's unchallenged factual findings support its implicit conclusion that the Club's activities were unreasonable with respect to safety issues. We hold that the trial court's factual findings supported its determination that the safety issues arising from the Club's activities constituted a statutory and common law nuisance.

4. Expansion of Use/Unpermitted Development

[22] ¶ 75 The Club does not directly challenge the trial court's ruling that the Club's unlawful expansion of its nonconforming use and violation of various Code provisions represented a public nuisance. KCC 17.110.515 provides that "any violation of this title shall constitute a nuisance, per se." KCC 17.530.030 provides that "any use ... in violation of this title is unlawful, and a public nuisance." We held above that the Club's expansion of its nonconforming use violated former KCC 17.455.060. Similarly, the Club's unpermitted development work violated Code provisions. *See, e.g.*, KCC 12.10.030 (activities requiring site development activity permits). Accordingly, it is undisputed that the Club's use expansion and unpermitted development work at the property constituted a nuisance as a matter of law.

5. Existence of a Public Nuisance

¶ 76 The County brought this action against the Club on behalf of the public. As a result, in order to prevail the County must show not only that the Club's activities constitute a nuisance, but that they constitute a *public* nuisance. The Club argues that the trial court erred in determining that the Club's activities constituted a public nuisance. We disagree.

¶ 77 RCW 7.48.130 provides that a public nuisance is one that "affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." An example of a public nui-

sance was presented in *Miotke v. City of Spokane*, where the city of Spokane discharged raw sewage into the Spokane River. 101 Wash.2d 307, 309, 678 P.2d 803 (1984). The plaintiffs were the owners of lakefront properties below a dam on the river. *Miotke*, 101 Wash.2d at 310, 678 P.2d 803. The court held that the release constituted a public nuisance because it affected the rights of all members of the community living along the lake shore. *Miotke*, 101 Wash.2d at 331, 678 P.2d 803.

a. Excessive Noise

¶ 78 The trial court made no express ruling that the excessive noise from the Club's activities affected equally the rights of an entire community. But the trial court made a finding accepting as persuasive the testimony of current and former neighbors who described noise conditions that "interfere[d] with the comfort and repose of residents and their use and enjoyment of their real properties" and who "describe[ed] their everyday lives as being exposed to the 'sounds of war.'" CP at 4073. The trial court also found that "[t]he testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the [Club's] Property." CP at 4073. This finding implicitly identifies the relevant "community" as the area within two miles of the Club. Finally, the trial court cited to RCW 7.48.130 (and other nuisance statutes) in entering a conclusion of law stating that the Club's property "has become and remains a place violating the comfort, repose, health and safety *of the entire community or neighborhood.*" CP at 4078. (Emphasis added.)

¶ 79 The Club argues that the noise conditions are not a public nuisance because the evidence shows that noise from the Club does not affect the rights of all members of the community equally. The Club points to testimony from witnesses that stated that the noise from the Club did not disturb them. However, every neighbor testifying discussed the noise caused by the Club, which the trial court found affected all property within a two mile radius of the Club. In this respect, the facts here are similar to those in *Miotke*, where the pollutants affected every lakefront property owner. The fact that some residents were not much *bothered* by the noise does not defeat the public nuisance claim because it relates to the extent of damage caused by the condition, which need not be equal.

¶ 80 We hold that the trial court's unchallenged factual findings support its determination that noise from the Club constituted a public nuisance.

b. Safety Issues

¶ 81 Regarding safety, the trial court entered findings referencing the testimony of range safety experts and finding that "more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future." CP at 4070. The trial court also found that the Club's facilities were inadequate to contain bullets inside the property. However, once again the trial court made no factual findings regarding safety that specifically addressed the public nuisance question.

¶ 82 The Club argues that fear of bullets leaving the Club's property does not equally affect all members of the community. As with the noise, the Club argues that some witnesses testified that they were not afraid of the Club. However, the trial court cited to RCW 7.48.130 in stating that the Club's property "has become and remains a place violating the ... safety of the *entire* community or neighborhood." CP at 4078 (Emphasis added.) And the trial court's finding that it was likely that bullets would escape the shooting areas and possibly cause injury or damage supports a conclusion that the risk of injury or damage is equal in all areas where bullets might escape. Although the trial court did not address the exact parameters of the affected area, the failure to identify the applicable community does not preclude a public nuisance finding.

¶ 83 We hold that the trial court's unchallenged factual findings support its determination that safety issues constituted a public nuisance.

c. Expansion of Use/Unpermitted Development

¶ 84 As noted above, KCC 17.530.030 provides that any use in violation of the zoning ordinances is a public nuisance, and KCC 12.32.010 provides that violation of certain permitting requirements is a public nuisance. This is consistent with the principle that one type of public nuisance involves an activity that is forbidden by statute or ordinance. 17 Stoebuck & Weaver, § 10.3, at 663. As a result, the trial court ruled that the Club's unpermitted development work constituted a public nuisance.

¶ 85 The Club does not directly challenge the trial court's finding of a public nuisance on this basis. Because the Club's expansion of use and unpermitted development work violated various Code provisions, it is undisputed that the Club's unpermitted development work constituted a public nuisance.

D. Effect of Deed of Sale

¶ 86 The Club argues that even if its activities were unlawful as discussed above, the language of the deed of sale transferring the property title from the County to the Club prevents the County from challenging any part of the Club's status or operation as it existed in 2009, including expansion of its nonconforming use status, permitting violations, and nuisance activities. According to the Club, the deed represented a settlement of any potential disputes regarding the Club's nonconforming use, including any Code violations, and was an affirmation that the Club may operate as it then existed and improve its facilities within the historical eight acres. The Club argues that this settlement is enforceable as an accord and satisfaction affirmative defense or a breach of contract counterclaim. The Club also argues that the deed provisions and extrinsic evidence estop the County from attempting to terminate the Club's. nonconforming use or denying that the Club's then-existing facilities and operations were not in violation of the Code or a public nuisance.

¶ 87 The trial court ruled that the deed did not prevent or estop the County from challenging the Club's unlawful uses of its property. We agree with the trial court.

1. Standard of Review

[23–25] ¶ 88 Interpretation of a deed is a mixed question of fact and law. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash.2d 442, 459 n. 7, 243 P.3d 521 (2010). Our goal is to discover and give effect to the parties' intent as expressed in the deed. *Harris v. Ski Park Farms, Inc.*, 120 Wash.2d 727, 745, 844 P.2d 1006 (1993). The parties' intent is a question of fact and the legal consequence of that intent is a question of law. *Affiliated FM Ins.*, 170 Wash.2d at 459 n. 7, 243 P.3d 521. We defer to the trial court's factual findings if they are supported by substantial evidence and review questions of law and conclusions of law de novo. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw. Inc.*, 168 Wash.App. 56, 64, 277 P.3d 18 (2012); *Casterline*, 168 Wash.App. at 381, 284 P.3d 743.

2. Accord and Satisfaction Defense/Breach of Contract Counterclaim

¶ 89 The Club argues that the trial court erred in failing to interpret the deed as incorporating a covenant by the County to allow the Club to continue the shooting range as it then existed, enforceable under contract law, or as a settlement of potential land use disputes under principles of accord and satisfaction.[9] The Club relies on (1) deed clauses providing for improvement and expansion of the shooting range, (2) a claimed implied duty to allow the Club to perform the deed's public access clause, (3) a claimed implied duty not to frustrate the purpose of the deed—for the Club to continue operating the shooting range, and (4) extrinsic evidence that allegedly confirms the Club's interpretation of the parties' intent. We disagree with the Club.

9. The Club also argues that the deed guaranteed its right to continue operating as a nonconforming shooting range as it existed at the time of the deed. Because we hold below that the Club's unlawful property use does not terminate its nonconforming use status, we need not address this issue.

a. Improvement and Expansion Clauses

[26] ¶ 90 The deed addresses improvement and expansion of the shooting range. The Club refers to the "improvement clause," which provides:

> [The Club] shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight (8) acres of active shooting ranges with the balance of the property serving as safety and noise buffer zones; provided that [the Club] may upgrade or improve the property and/ or facilities within the historical approximately eight (8) acres in a manner consistent with "modernizing" the facilities consistent with management practices for a modern shooting range.

CP at 4088. The deed also contains an "expansion clause," which states that "[the Club] may also apply to Kitsap County for expansion beyond the historical eight (8) acres, for 'supporting' facilities for the shooting ranges or additional recreational or shooting facilities, provided that said expansion is consistent with public safety, and conforms with the terms and conditions [in this deed] ... and the rules and regulations of Kitsap County for development of private land." CP at 4088.

¶ 91 The Club argues that the juxtaposition of the improvement clause and the expansion clause (which requires an application and compliance with rules and regulations) means that improvements within the historical eight acres are allowed uses and do not need to comply with county development regulations. We disagree.

¶ 92 First, the improvement clause makes no reference to the Club's existing use, except to limit the Club's use to eight acres. Specifically, the clause says nothing about the lawfulness of the Club's existing use, the County's position regarding that use, or the settlement of any potential land use disputes.

¶ 93 Second, the language regarding improvements refers only to future modernization. The clause does not ratify unpermitted development activities that occurred in the past. Even if the two clauses could be interpreted as waiving any Code requirements for future work, the deed by its clear language does not apply to past work. And most of the development work the trial court referenced in its decision took place before the deed's execution.

¶ 94 Third, the deed states that the conveyance of land is made subject to certain covenants and conditions, "the benefits of which shall inure to the benefit of the public and the burdens of which shall bind the [Club]." CP at 4087. The improvement clause is one such restrictive covenant: it restricts the Club's property use to its active shooting range facilities consistent with its' eight acres of historical use and then makes an exception for certain improvements within the eight acres and further expansion by application. It would be unreasonable to view a restrictive covenant in the deed as an affirmative ratification of past development and a waiver of future development permitting violations. Accordingly, we reject the Club's argument that the improvement and expansion clauses preclude the County from challenging the Club's shooting range activities.

b. Public Access Clause

[27] ¶ 95 The deed provides that access by the public to the Club's property must be offered at reasonable prices and on a nondiscriminatory basis. The Club argues that the trial court erred in "failing to give effect to the County's implied duty to allow the Club to perform the public access provision in the [d]eed." Br. of Appellant at 43. The Club states that it was depending on the County's approval of its then-existing facilities and operations when it agreed to provide public access. The Club also claims that the County's attempt to shut down the shooting range would prevent the Club from performing its side of the contract. We disagree.

¶ 96 The language in the public access clause does not restrict the County from enforcing zoning regulations or seeking to abate nuisance conditions on the conveyed property. And the Club has cited no authority for the proposition that its agreement to provide public access somehow prevents the County from taking actions that would limit Club activities. Accordingly, we reject the Club's argument that the public access clause

precludes the County from challenging the Club's shooting range activities.[10]

c. Implied Duty Regarding Frustration of Purpose

[28] ¶ 97 The Club contends that the trial court erred in "failing to give effect to the County's implied duty not to frustrate the [d]eed's purpose of allowing the Club to continue operating its nonconforming shooting range as it existed within the historical eight acres of active use." Br. of Appellant at 45. The Club argues that the deed expressed the understanding that the Club was purchasing the property for that purpose and that as the grantor/seller, the County implied that what was sold was suitable for that purpose and bore the risk if it was not. We disagree.

¶ 98 Under the Code, the Club did have the right to continue its nonconforming use. KCC 17.460.020. But the County's lawsuit alleged that the Club had expanded outside its nonconforming use right, developed the land without proper permits, and operated the range in a manner that constituted a nuisance. Those alleged conditions are all within the Club's control. The County's sale of the land even for the purpose of facilitating the Club's continued existence does not prevent the County from insisting that it be operated in a manner consistent with the law. We reject the Club's argument.

d. Extrinsic Evidence

¶ 99 The Club argues that extrinsic evidence demonstrated that the County intended to resolve all land use issues at the Club's property by the terms of the deed. The Club claims that (1) the County's statements in conjunction with the deed were an expression of its intent to approve and ratify any potentially actionable existing conditions on the property, and (2) the County's knowledge of potential issues involving the Club shows that the County intended to settle or waive those issues with the deed. We hold that the record supports the trial court's factual findings.

¶ 100 The Club relies on four pieces of extrinsic evidence. First, the minutes and recordings of the Board's meeting include statements by a county official and two county commissioners in support of the land sale so that its existing use as a shooting range may continue. Second, a Board resolution supported the Club's continued shooting range operation and stated that it is "in the best economic interest of the County to provide that [the Club] continue to operate with full control over the property on which it is located." CP at 858. Third, a letter from one of the county commissioners entered into the public record stated that the Board earlier had assured a state agency (that was considering providing grant funds to the Club), that the "[Club] and its improvements were not at odds with the County's long-term interest in the property." CP at 3793. Fourth, the evidence shows that at the time the deed was executed the County was aware of possible existing permitting violations, unlawful expansion, and complaints from neighbors about the Club.

¶ 101 However, the trial court's findings show that it considered this evidence and concluded that the evidence did not support the Club's arguments. The Club argues that the trial court erroneously found that "[t]he only evidence produced at trial to discern the County's intent at the time of the 2009 Bargain and Sale Deed was the deed itself," CP 4058, because the Club produced substantial evidence bearing on the County's intent and the trial court failed to consider it. But we interpret the court's factual finding to mean that the trial court considered the deed as the only *credible* evidence of the County's intent. The finding cannot be read to mean that the deed was the only evidence produced because it is clear that the trial court did consider other evidence bearing on the parties' intent.

¶ 102 After considering the extrinsic evidence, the trial court found that (1) the Board's minutes and recordings do not reveal an intent to settle disputed claims or land use decisions or land use status at the property,

10. Because we hold below that terminating the Club's nonconforming use is not an appropriate remedy for the Club's unlawful activities, we need not address whether the public access clause would prevent the County from shutting down the Club.

and (2) the parties did not negotiate for the resolution of potential civil violations of the Code at the property or to resolve the property's land use status.[11] The trial court also made an *unchallenged* factual finding that the deed does not identify or address any then-existing disputes between the Club and County. The Club disagrees with these findings, but the weight given to certain evidence is within the trial court's discretion.

¶ 103 In essence, the Club is asking us to substitute our view of the evidence for the trial court's findings. That is not our role.

> [W]here a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

Bale v. Allison, 173 Wash.App. 435, 458, 294 P.3d 789 (2013) (quoting *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wash.App. 710, 717, 225 P.3d 266 (2009)) (emphasis omitted). Accordingly, we reject the Club's argument that extrinsic evidence supports its interpretation of the deed language.

3. Estoppel Defense

¶ 104 The Club assigns error to the trial court's denial of its equitable estoppel defense. Apparently the Club contends that the County is estopped from asserting all of its claims. We need not decide whether the County should be estopped from seeking termination of the Club's nonconforming use because we hold below that termination is not an appropriate remedy for the Club's allegedly prohibited activities. But we disagree that estoppel applies to the County's other claims.

[29, 30] ¶ 105 Equitable estoppel against a governmental entity requires a party to prove five elements by clear and convincing evidence:

> (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is 'necessary to prevent a manifest injustice'; and (5) estoppel will not impair governmental functions.

Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wash.2d 868, 887, 154 P.3d 891 (2007) (quoting *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993)). Whether equitable relief is appropriate is a question of law. *Niemann v. Vaughn Cmty. Church*, 154 Wash.2d 365, 374, 113 P.3d 463 (2005).

[31] ¶ 106 The Club's estoppel defense is not viable because the County's enforcement of its Code and nuisance law is not inconsistent with its earlier position. The County's general support for the shooting range's continued existence is not inconsistent with its current insistence that the range conform to development permitting requirements and operate in a manner not constituting a nuisance. Moreover, the County's enforcement of its zoning code and nuisance law is a government function. *See City of Mercer Island v. Steinmann*, 9 Wash.App. 479, 482, 513 P.2d 80 (1973). If the County was estopped from enforcing those laws, it would certainly impair governmental functions. Finally, estoppel is not required to prevent manifest injustice here, especially because the Club's allegation of the County's inconsistency is tenuous.

11. The County argues that these findings of fact should be treated as verities because the Club did not assign error to them in its initial brief and fails to assign error to the trial court's failure to adopt any of its proposed findings. RAP 10.3(g), 10.4. However, the County acknowledges and responds to the findings of fact that the Club disputes in the body of its brief—findings 23, 35, 26, and 57. Although the Club violated RAP 10.3(g), we exercise our discretion to waive the Club's failure to strictly comply with the procedural rules. *See In re Disciplinary Proceeding Against Conteh*, 175 Wash.2d 134, 144, 284 P.3d 724 (2012).

¶ 107 The Club has failed to prove the essential elements of estoppel. We hold that the trial court did not err in rejecting the Club's estoppel defense.

REMEDY FOR THE CLUB'S UNLAWFUL USE

A. TERMINATION OF NONCONFORMING USE

¶ 108 The Club argues that the trial court erred in concluding that an unlawful expansion of the Club's nonconforming use, unpermitted development activities, and public nuisance activities terminated the Club's legal nonconforming use of the property as a shooting range. As a result, the Club argues that the trial court erred in issuing a permanent injunction shutting down the shooting range until the Club obtains a conditional use permit. We agree, and hold that the termination of the Club's nonconforming use is not the appropriate remedy for its unlawful uses.

1. Standard of Review

[32, 33] ¶ 109 Injunctive relief is an equitable remedy, and we review a trial court's decision to grant an injunction and the terms of that injunction for an abuse of discretion. *Early Dawn Estates*, 173 Wash.App. at 789, 295 P.3d 314. However, whether termination of a property's nonconforming use is an appropriate remedy for unlawful uses of that property is a question of law, which we review de novo. *See King County, DDES*, 177 Wash.2d at 643, 305 P.3d 240 (reiterating that legal questions "are reviewed de novo."). If termination of the nonconforming use is an appropriate remedy as a matter of law, we apply the abuse of discretion standard in reviewing the trial court's decision to select that remedy.

2. Kitsap County Code

[34] ¶ 110 The KCC chapter on nonconforming uses, KCC 17.460.010, allows nonconforming uses to continue until they are removed or discontinued. KCC 17.460.020 further states that a nonconforming use may be continued as long as it is "otherwise lawful." The County argues that this ordinance allows termination of the Club's operation as a shooting range because the Club's unlawful expansion, permitting violations, and/or nuisance prevents the nonconforming use from being "otherwise lawful." We disagree with the County's interpretation of the Code.

¶ 111 First, based on the plain language of the Code it is the nonconforming *use* that must remain lawful. KCC 17.460.020. A "use" of land means "the nature of occupancy, type of activity or character and form of improvements to which land is devoted." KCC 17.110.730. The Club's use of the property is as a shooting range. Therefore, the question under KCC 17.460.020 is whether a *shooting range* is a lawful use of the Club's property (other than the fact it does not conform to zoning regulations), not whether specific activities at the range are unlawful. For instance, termination of the Club's nonconforming use may be an appropriate remedy under KCC 17.460.020 if that use would not be allowed to continue under any circumstances, such as if the County or the State passed a law prohibiting all shooting ranges. But here the use of the Club's property as a shooting range remains lawful, and therefore any unlawful expansion of use, permitting violations, or nuisance activities cannot trigger termination of the otherwise lawful nonconforming use.

¶ 112 Second, the penalty and enforcement provisions of the Code do not support a termination remedy. KCC 17.530.020, which is a section entitled "penalties" in the enforcement chapter of the zoning title, provides that violation of any provision of the zoning title constitutes a civil infraction and that the County may seek civil penalties. There is no mention of forced termination of an existing nonconforming use based on a Code violation. And the Code expressly provides for a less drastic remedy. KCC 17.530.050, which also is within the enforcement chapter, provides that "the director may accept a written assurance of discontinuance of any act in violation of this title from any person who has engaged in such act." In support of this position, we note that the County's chief building official Jeffrey Rowe testified that the Code allows a landowner to get back into conformity by retracing a prohibited expansion, enlargement, or change of use.

¶ 113 Specifically regarding nuisance, KCC 17.530.030 provides that any person may bring an action to abate a nuisance. But there is no authority supporting a proposition that an activity on property that constitutes a nuisance operates to terminate that property's nonconforming use status.

¶ 114 Third, the County's interpretation allowing any expansion of use, permitting violation, or nuisance activity to terminate a nonconforming use would eviscerate the value and protection provided by a legal nonconforming use. Nonconforming use status would have little value if an expansion of that use would prevent the owner from continuing the lawful use in place before the expansion. And this would be contrary to the Code's stated purpose in KCC 17.460.010: to permit nonconforming uses to continue.

¶ 115 We hold that the Code does not provide for a termination remedy for Code violations or unlawful expansion of nonconforming uses.

2. Common Law

¶ 116 The common law also does not support the trial court's remedy. We have found no Washington case holding that an unlawful expansion of a nonconforming use, permitting violations, or nuisance activities terminates a nonconforming use. Further, no Washington case has even suggested such a remedy. In *Keller*, the plaintiffs challenged as unlawful the enlargement of a chlorine manufacturing facility that was a nonconforming use. 92 Wash.2d at 728–29, 600 P.2d 1276. Although the Supreme Court did not specifically address the remedy for an unlawful expansion, it gave no indication that the entire facility could be shut down if the enlargement constituted an unlawful expansion.

¶ 117 Courts in other jurisdictions have concluded that in the absence of statutory authority, an unlawful expansion of a nonconforming use does not operate to terminate that use. *State ex rel. Dierberg v. Bd. of Zoning Adjustment of St. Charles County*, 869 S.W.2d 865, 870 (Mo.App.1994); *Garcia v. Holze*, 94 A.D.2d 759, 462 N.Y.S.2d 700, 703 (1983). Instead, the remedy is to discontinue the activities that exceed the lawful nonconforming use. *See Dierberg*, 869 S.W.2d at 870.

¶ 118 Similarly, no Washington court has held that permitting violations associated with a nonconforming use terminates that use. In *Rhod–A–Zalea*, the Supreme Court held that the owner of a peat mine operated as a nonconforming use had violated permitting requirements for grading activities. 136 Wash.2d at 19–20, 959 P.2d 1024. Again the court did not specifically address the remedy for this violation, but did not even suggest that the failure to obtain required permits would allow termination of the mining operation.

¶ 119 And no Washington court has held that nuisance activities associated with a nonconforming use terminate that use. Historically, public nuisances were prosecuted only criminally (fine or jail time), but in more modern times legislators have enacted measures emphasizing abatement of the nuisance over assessing criminal penalties. 8 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 73.08(d), at 479–80 (David A. Thomas ed.2013). *See also* RCW 7.48.200 (providing that "[t]he remedies against a public nuisance are: Indictment or information, a civil action, or abatement").

3. Appropriate Remedy

[35] ¶ 120 We hold that termination of the Club's nonconforming use status is not the proper remedy even though the Club did expand its use, engage in unpermitted development activities, and engage in activities that constitute a nuisance. Neither the Code nor Washington authority supports this remedy, and such a remedy would impermissibly interfere with legal nonconforming uses.

¶ 121 In order to implement its conclusion that the Club's nonconforming use had terminated, the trial court issued an injunction enjoining the Club from operating a shooting range on its property until it obtained a conditional use permit for a private recreational facility or some other authorized use. We vacate this injunction because it is based on an incorrect conclusion that the nonconforming use was terminated.

¶ 122 The appropriate remedy for the Club's expansion of its nonconforming use must reflect the fact that some change in use—"intensification"—is allowed and only "expansion" is unlawful. For the permitting violations, the Code provides the appropriate remedies for the Club's permitting violations. *See* KCC 12.32.010, .040, .050; KCC 19.100.165. We address the appropriate remedy for public nuisance in the section below.

¶ 123 We remand to the trial court to determine the appropriate remedies for the Club's expansion of its nonconforming use and the Club's permitting violations.

B. Remedy for Public Nuisance

[36] ¶ 124 The trial court issued a second permanent injunction designed to abate the public nuisance conditions at the Club's property, which prohibited the use of fully automatic firearms, rifles of greater than nominal .30 caliber, exploding targets and cannons, and use of the property as an outdoor shooting range before 9:00 AM or after 7:00 PM. The Club argues that the court erred in entering the injunction because the activities enjoined do not necessarily constitute a nuisance, and therefore the injunction represents the trial court's arbitrary opinions regarding how a shooting range should be operated. We disagree.

¶ 125 The trial court had the legal authority to enter an injunction designed to abate a public nuisance under both RCW 7.48.200 and KCC 17.530.030. Therefore, the only issue is whether the terms of the injunction were appropriate. Injunctive relief is an equitable remedy, and we review a trial court's decision to grant an injunction and the terms of that injunction for an abuse of discretion. *Early Dawn Estates*, 173 Wash.App. at 789, 295 P.3d 314. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Recreational Equip.*, 165 Wash.App. at 559, 266 P.3d 924. We will not reweigh the trial court's equitable considerations. *Recreational Equip.*, 165 Wash.App. at 565, 266 P.3d 924. Here, the trial court's findings are supported by substantial evidence and those findings support its discretionary determination that it should grant equitable relief. Therefore, we hold that the trial court did not abuse its discretion in issuing this injunction as a remedy for the Club's nuisance activities. The limitation of the activities is reasonably related to the noise-related nuisance and possibly to the safety-related nuisance.

¶ 126 The trial court also issued a warrant of abatement, with terms to be determined at a later hearing. The Club argues that this warrant of abatement was issued in error because it fails to set forth the conditions of abatement. However, the trial court had statutory authority to issue the warrant of abatement, and under the circumstances it was not inappropriate to defer entry of specific details.

Issues Raised Only By Amicus Briefs

¶ 127 Two amicus briefs raise additional arguments against terminating the Club's nonconforming use right. The Kitsap County Alliance of Property Owners argues that substantive due process rights prevents the Code from being interpreted to terminate the Club's nonconforming use right. And the National Rifle Association argues that such a remedy violates the Second Amendment. Neither of these issues was raised at the trial court or in the parties' appellate briefs.

[37] ¶ 128 We do not need to consider the arguments raised solely by amici. *See, e.g., State v. Hirschfelder*, 170 Wash.2d 536, 552, 242 P.3d 876 (2010) (courts "need not address issues raised only by amici"); *State v. Jorden*, 160 Wash.2d 121, 128 n. 5, 156 P.3d 893 (2007) (court is "not bound to consider argument raised only by amici"). Moreover, because we hold that termination of the Club's nonconforming right was error, there is no need to consider these constitutional arguments. We refrain from deciding constitutional issues if the case can be decided on non-constitutional grounds. *Isla Verde Int'l Holdings, Inc., v. City of Camas*, 146 Wash.2d 740, 752, 49 P.3d 867 (2002).

CONCLUSION

¶ 129 We affirm the trial court's rulings that (1) the Club's commercial use of the

property and dramatically increased noise levels constitute an impermissible expansion of its nonconforming use; (2) the Club's development work unlawfully violated various County land use permitting requirements; and (3) the excessive noise, unsafe conditions, and unpermitted development work constituted a public nuisance. We reverse the trial court's ruling that increased hours of operation constitute an expansion of its nonconforming use.

¶ 130 Regarding the remedy for the Club's unlawful activities, we reverse the trial court's ruling that termination of the Club's nonconforming use status as a shooting range is a proper remedy. We vacate the trial court's injunction enjoining the property's use as a shooting range. But we affirm the trial court's injunction limiting certain activities at the Club in order to abate the Club's nuisance activities. We remand for the trial court to determine the appropriate remedy for the Club's expansion of its nonconforming use and permitting violations.

We concur: JOHANSON, C.J., and MELNICK, J.

STATE of Washington, Respondent,

v.

Daniel Jay PEREZ, Appellant.

No. 69707-2-I.

Court of Appeals of Washington, Division 1.

Nov. 3, 2014.

Background: Defendant was convicted in the Superior Court, Snohomish County, Anita L. Farris, J., of attempted second degree murder and assault in the second degree of fellow inmate at correctional complex. He appealed.

Holdings: The Court of Appeals, Schindler, J., held that:

(1) victim's statements were nontestimonial, and thus were not barred under Confrontation Clause, and

(2) trial court did not abuse its discretion in admitting victim's statements under excited utterance hearsay exception.

Affirmed in part and remanded with direction.

1. Criminal Law ⇐662.7, 662.8, 662.9

Confrontation Clause bars admission of testimonial statements of witness who did not appear at trial unless he was unavailable to testify, and defendant had been afforded prior opportunity for cross-examination. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐662.8

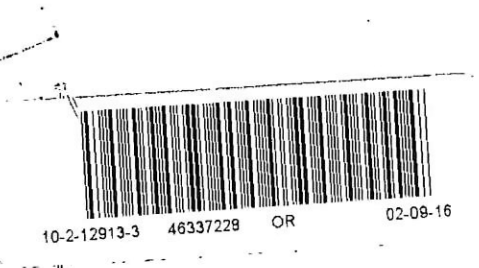
Existence of ongoing emergency at time of encounter between individual and police is among the most important circumstances informing the primary purpose of interrogation when determining whether statements made during interrogation would be barred as testimonial under Confrontation Clause. U.S.C.A. Const.Amend. 6.

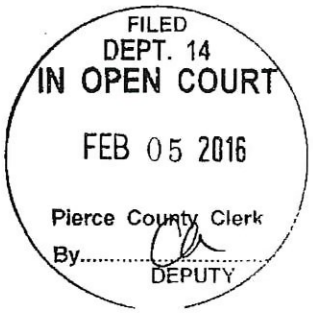
3. Criminal Law ⇐662.8

Relevant inquiry when determining whether primary purpose of police questioning was to enable police assistance to meet ongoing emergency, such that statements made during questioning would not be barred as testimonial under Confrontation Clause, is not subjective or actual purpose of individuals involved in a particular encounter, but rather purpose that reasonable participants would have had, as ascertained from individuals' statements and actions and circumstances in which encounter occurred. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐662.8

Objective analysis of circumstances of encounter between individual and police and statements and actions of parties to it provides the most accurate assessment of primary purpose of interrogation when determining whether statements made during interrogation were barred as testimonial





IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

KITSAP COUNTY, a political subdivision of the State of Washington

Plaintiff,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE ROES I-XX, inclusive

Defendants

and

IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton Washington

NO. 10-2-12913-3

ORDER SUPPLEMENTING JUDGMENT ON REMAND

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court for further proceedings upon remand from Division II of the Court of Appeals. The parties appeared through their attorneys of record Christine M. Palmer and Neil R. Wachter for the Plaintiff and Brian Chenoweth and Brooks Foster for the Defendant and submitted written briefs and proposed amended judgments to address the issue of a revised remedy. The Court considered the

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October 28, 2014 ruling of the Court of Appeals in *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014), *review denied*, 183 Wn.2d 1008 (2015); the motions, briefings, and proposed amended judgments filed by the parties; the arguments of counsel; the trial court record; and the records and files herein. Being fully advised in the premises, the Court hereby supplements the original Findings of Fact, Conclusions of Law and Order as follows:

I. FINDING OF FACT REGARDING THE APPLICABILITY OF FORMER KCC §17.455.060

1. On June 25, 2012, the Kitsap County Board of County Commissioners enacted Kitsap County Ordinance No. 490-2012, which included a provision repealing former Kitsap County Code § 17.455.060, effective as of July 1, 2012.

II. CONCLUSIONS OF LAW REGARDING THE APPLICABILITY OF FORMER KCC §17.455.060

1. Former KCC §17.455.060 is subject to the savings provision of the Kitsap County Code at KCC §1.01.040, which applies to all sections of the Code pursuant to KCC §1.04.050. As an "action [or] proceeding which began before the effective date" of the repealing ordinance, the instant action is not affected by the repeal of KCC §17.455.060.

2. Kitsap County Ordinance No. 490-2012 contains no language from which one can reasonably infer that the legislative body intended the repeal of KCC §17.455.060 to affect pending litigation.

3. Kitsap County Ordinance No. 490-2012's repeal of KCC §17.455.060 is neither clearly curative nor remedial in nature. *In re F.D. Processing*, 119 Wn.2d 452, 461-62, 832 P.2d 1303 (1992). Therefore, the Court further concludes that the repeal of KCC §17.455.060 shall not be applied retroactively to the facts of this action. As such, former KCC §17.455.060 applies to the

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facts of this action.

III. ORDERS

A. The following orders will replace and supplement Orders No. 1 and 2, page 33 of the Judgment, and Order No. 6, page 34 of the Judgment:

DECLARATORY JUDGMENT

1. Kitsap County's request pursuant to Chapter 7.24 RCW for judgment declaring that activities and uses of the Property consisting of military training uses; commercial, for-profit uses; and uses increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber and practical shooting, each constitute unlawful expansions of and changes to the nonconforming use of the Property as a shooting range by operation of former KCC §17.455.060, KCC Chapter 17.460, KCC §17.100.030, and Washington common law regarding nonconforming uses, is hereby GRANTED.

6. **LAND USE INJUNCTION (EFFECTIVE IMMEDIATELY)**

a. A permanent, mandatory and prohibitive injunction is hereby issued enjoining each of the following expanded uses of the Property until such time that a conditional use permit is applied for and issued to specifically authorize the intended changed or expanded use(s):

1. Commercial, for-profit uses;

2. Military training uses;

3. Use of explosive devices including exploding targets;

4. Use of high caliber weaponry greater than .30 caliber; and

5. Practical shooting, uses, including organized competitions and practice sessions.

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b. A permanent, mandatory injunction is hereby issued further requiring Defendant to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment. Defendant's application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.

B. The Court further orders that a WARRANT OF ABATEMENT may be authorized upon further application by the Plaintiff, in the event that the Defendant's participation in the County permitting process does not cure the code violations and permitting deficiencies on the Property.

DONE IN OPEN COURT this 5th day of February, 2016.

HON. SUSAN K. SERKO, JUDGE
PIERCE COUNTY SUPERIOR COURT

FILED
DEPT. 14
IN OPEN COURT
FEB 05 2016
Pierce County Clerk
By..... DEPUTY

Presented by:

NEIL R. WACHTER, WSBA No. 23278
Special Deputy Prosecuting Attorney
CHRISTINE M. PALMER; WSBA No. 42560
Deputy Prosecuting Attorney
Kitsap County Prosecutor's Office
Attorneys for Plaintiff Kitsap County

APPROVED FOR ENTRY:

BRIAN D. CHENOWETH, WSBA No. 25877
BROOKS FOSTER, Appearing *pro hac vice*
Attorneys for Defendant Kitsap Rifle and Revolver Club

TINA R. ROBINSON
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083

CERTIFICATE OF SERVICE

I, Skylar Washabaugh, declare under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned a resident of the State of Oregon, over the age of eighteen years, not a party to or interested in the above-titled action, and competent to be a witness herein.

On the date given below, a copy of BRIEF OF APPELLANT was served upon the following individuals by via email, pursuant to an e-service agreement between the parties, to the following:

Christine M. Palmer
Laura F. Zippel
Kitsap County Prosecutor's Office
Civil Division
614 Division St., MS-35A
Port Orchard, WA 98366
Email: cmpalmer@co.kitsap.wa.us
lzippel@co.kitsap.wa.us

I filed the BRIEF OF APPELLANT electronically with the Court of Appeals, Division II, through the Court's online efiling system.

DATED: December 23, 2016

CHENOWETH LAW GROUP, PC

Skylar Washabaugh, Paralegal
swashabaugh@northwestlaw.com